No. 12691 2662

United States
Court of Appeals
for the Ninth Circuit.

ROYAL INDEMNITY COMPANY, a Corporation,

Appellant.

vs.

GEORGE N. OLMSTEAD,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12691

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

TRIPP & CALLAWAY,
210 West Seventh St.,
Los Angeles 14, Calif.

For Appellee:

C. PAUL DuBOIS,
515 Van Nuys Bldg.,
210 West Seventh St.,
Los Angeles 14, Calif.

District Court of the United States, Southern District of California, Central Division

No. 8729-OC

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation, et al.,

Defendants.

PETITION BY DEFENDANT CORPORATION FOR REMOVAL TO FEDERAL COURT

To the Honorable, District Court of the United States, Southern District of California, Central Division:

The petition of the Royal Indemnity Company, the defendant in the above-entitled action, respectfully shows:

1. That defendant Royal Indemnity Company is a non-resident of the State of California and is a corporation organized under the laws of the State of New York.

2. That plaintiff was at the time of bringing said suit, and still is, a resident and citizen of the State of California.

3. That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00).

4. That the said suit is of a civil nature, namely, an action for breach of contract and the controversy in this action is wholly between citizens of different states. [2*]

5. Your petitioner offers herewith a good and sufficient surety for its entering in the District Court of the United States, the Southern District of California, Central Division, within 30 days of the date of filing of this petition, a copy of the record of this suit, and for paying all costs that may be awarded by said District Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this honorable court to make an order of removal of this suit from the Superior Court of the State of California in and for the County of Los Angeles to said District Court, and to accept the said surety and bond, and to cause the records in said Superior Court to be removed into said District Court of the United States the Southern District of California, Centeral Division.

ROYAL INDEMNITY
COMPANY,

By /s/ M. J. RHEW,
Manager. [3]

State of California,
County of Los Angeles—ss.

M. J. Rhew being by me first duly sworn, deposes and says: that he is the manager of the Royal In-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

demnity Company, a corporation, the above-named defendant in the foregoing and above-entitled action; that he has read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he is authorized to make this verification for and on behalf of said corporation.

/s/ M. J. RHEW.

Subscribed and sworn to before me this 5th day of October, 1948.

[Seal] /s/ ELIZABETH P. WILLIAMS,

Notary Public in and for the County of Los Angeles, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed October 6, 1948. [4]

[Title of District Court and Cause.]

AMENDED COMPLAINT
MONEY DUE ON CONTRACT

Plaintiff complains of the defendants and for a cause of action alleges:

I.

That the defendants were, at all times herein referred to, and are corporations duly existing, qualified and doing business in the State of California,

and having and maintaining, at all times herein mentioned, offices in the County of Los Angeles, State of California.

II.

That defendants Doe Company, a corporation, and Roe Company, a corporation, were, at all times herein, and now are corporations, and are sued herein by fictitious names for the reason that plaintiff does not know said names; plaintiff prays leave to amend this complaint when the identities of said corporations are discovered.

That plaintiff is informed and believes and thereupon alleges [5] that defendants Doe Company, a corporation, or Roe Company, a corporation, were, at all times herein, and now are corporations engaged in the business of insuring against excess liability or of re-insurance. That said Doe Company or Roe Company had on and prior to April 9, 1946, a written contract with defendant Royal Indemnity Company, a corporation, or Roy R. Jordan as executor of the Estate of Harry E. Blodgett, deceased, or as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, or with Harry E. Blodgett, an individual, doing business as Blodgett's Auto Service or Blodgett's Auto Service and Tours, to insure against excess liability from or to re-insure against claims or liabilities imposed by law for personal injuries or property damage resulting from accident occurring in the operation of the business known as Blodgett's Auto Service or Blodgett's Auto Service and Tours.

III.

That prior to April 9, 1946, Harry E. Blodgett did business in the County of Los Angeles, State of California, under the fictitious firm names of "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" in the renting for hire of passenger automobiles or drive-yourself passenger vehicles.

IV.

That on or about February 15, 1946, Harry E. Blodgett, died, and he was, at the time of his death, a resident of and left an estate in the County of Los Angeles, State of California.

V.

That shortly after February 15, 1946, Roy R. Jordan was duly appointed, qualified as and on April 9, 1946, was the executor of said Estate of Harry E. Blodgett, deceased, and was thereafter testamentary trustee under the Last Will and Testament of Harry E. Blodgett; and Roy R. Jordan was as of April 9, 1946, managing, conducting and operating the aforesaid car rental business referred to in Paragraphs III and IV hereinabove, which business was an asset of and owned by the said Estate and said business was being carried on by said Roy R. Jordan under order of the Superior Court of the State of California in and for the County of Los Angeles by its Probate Department. [6]

VI.

That at all times herein mentioned, the said Harry E. Blodgett or the Estate of Harry E. Blodgett, deceased, or Roy R. Jordan, as executor of said Estate or as testamentary trustee under the Last Will and Testament of said deceased, in conducting and operating said business known as Blodgett's Auto Service or Blodgett's Auto Service and Tours, conducted said business in the City of Pasadena, County of Los Angeles, State of California, and rented vehicles in said city with said vehicles to be used on the public streets of said City, County and State.

VII.

That said business was being operated within the provisions and under the terms of that certain ordinance of the City of Pasadena, a municipal corporation, a charter city, which said ordinance was known as Ordinance No. 3041, dated September 30, 1932, as amended, with said ordinance being entitled "An Ordinance of the City of Pasadena, Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sightseeing Purposes upon the Public Streets and Prescribing Penalties for the Violation thereof." That a written insurance contract, such as hereinafter referred to as Exhibit A, issued by Royal Indemnity Company and dated February 16, 1946, was required by said ordinance, and was applied for, because of and issued pursuant to, under and in accordance with

said ordinance, and said ordinance was, at all times mentioned herein, a part of the terms, covenants and agreements of said insurance contract. That said contract, Exhibit A, was caused to be filed with the City of Pasadena. That the said City issued a municipal permit under Section 2, a and 4, c of said ordinance to the said Blodgett or the said Blodgett's Auto Service or Blodgett's Auto Service and Tours or the said Estate or the said Jordan for the conducting of said business.

VIII.

That prior to April 9, 1946, on or about February 16, 1946, the Defendant Royal Indemnity Company had, for a valuable consideration, entered into said written insurance contract a "Comprehensive Liability Policy" dated [7] February 16, 1946, with Harry E. Blodgett, Harry E. Blodgett doing business as Blodgett's Auto Service and Tours, the Estate of Harry E. Blodgett, deceased, Roy R. Jordan as aforesaid executor of the said Estate or as testamentary trustee of said Estate; that a copy of said contract is annexed as Exhibit A and hereby is referred to and by this reference is incorporated at this point as though set out in full.

That a Packard automobile, hereinafter described, was and is scheduled in said insurance contract as a vehicle covered by the terms of said contract, and said vehicle was on April 9, 1946, an asset of and owned by Blodgett's Auto Service, Blodgett's Auto Service and Tours or the Estate of Harry E. Blodgett, deceased.

That said insurance contract provides that said Royal Indemnity Company guarantees payment to a judgment creditor for that part of said judgment which is within the amounts expressed in said policy, agrees to and would be liable for damage to property or the injury to any person, agrees with the insured to pay on behalf of the insured all sums which the insured shall become obligated to pay for damages because of bodily injury or injury to or destruction of property sustained by any person caused by accident, and would insure against liability from bodily injury or destruction of property or damage to property or for injury to any person or persons caused by and arising out of or resulting from negligence in the use, operation or ownership of the automobiles scheduled in said policy by any person operating said vehicle with permission of the owner. That said contract further provides that Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the Estate of Harry E. Blodgett, deceased or Roy R. Jordan as said executor or trustee, or any other person sustaining negligent injury, or whose property is negligently damaged becomes a judgment creditor, is protected by said contract. Further said contract provides that said Royal Indemnity Company shall defend in the name and on behalf of any suit against the insured.

IX.

That prior to April 9, 1946, to wit on or about April 7, 1946, Harry E. Blodgett or Blodgett's Auto Service or Blodgett's Auto Service and [8] Tours or Roy R. Jordan as executor or trustee of said estate, had rented in the City of Pasadena, County of Los Angeles, State of California, for a consideration, a certain passenger carrying automobile which was a 1940 Packard vehicle, Motor No. C59614, California license No. 10L343, for purposes of using said vehicle as a passenger carrying automobile for an initial term expiring April 14, 1946, to Sam Richardson, also known as Sam G. Richardson, and said automobile was in his possession for said purpose with the consent of the said Harry E. Blodgett or Blodgett's Auto Service or Blodgett's Auto Service and Tours or Roy R. Jordan, as executor or trustee of said estate, on April 9, 1946.

X.

That Sam G. Richardson on April 9, 1946, drove, operated and used said Packard automobile with the permission and consent of Harry E. Blodgett or Blodgett's Auto Service or Blodgett's Auto Service and Tours or Roy R. Jordan as said executor or testamentary trustee.

XI.

That plaintiff, on April 9, 1946, in the County of Los Angeles, State of California, sustained bodily injuries and suffered property damages in a col-

lision accident at which time Sam Richardson, also known as Sam G. Richardson, negligently drove the aforesaid Packard automobile into and upon plaintiff; and plaintiff, thereafter by reason of said event, by and through his guardian ad litem, commenced and prosecuted an action for damages for personal injuries and property damage against the said Sam Richardson, also known as Sam G. Richardson, in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 516890. That thereafter the court in said case signed Findings of Fact and Conclusions of Law, wherein the court found plaintiff had been damaged on account of said bodily personal injuries in the amount of $25,000.00, and that plaintiff's estate and property was injured, wasted, destroyed, taken or carried away on account of expenses in the sum of $4,357.00 and on account of loss of earnings in the sum of $1,643.00. That plaintiff obtained judgment against said Sam G. Richardson on the 12th day of September, 1946, in the sum of $31,000.00, [9] together with interest thereon at 7% per annum until paid, together with plaintiff's costs in the sum of $14.00. That said judgment has become and is now final.

XII.

That the person referred to as Sam G. Richardson referred to in Paragraphs IX and X is the same and identical person as the person referred to as Sam G. Richardson referred to in Paragraph XI.

XIII.

That defendants had prior to June 27, 1946, notice of said collision accident and time, place and circumstances thereof, and that claims were made on behalf of, and that suit was filed by this plaintiff for damage sustained by reason of negligence on the part of Sam G. Richardson in operating said Packard vehicle rented from and operated with the consent of Harry E. Blodgett, or Blodgett's Auto Service or Blodgett's Rental Service, or Roy R. Jordan as said executor or trustee.

XIV.

That defendants at no time notified Sam G. Richardson that said contract of insurance insured him pursuant to the terms and conditions therein. That defendant Royal Indemnity Company or Blodgett's Auto Service for Royal Indemnity Company received a consideration for insuring said Sam G. Richardson and like persons under said contract of insurance.

XV.

That said judgment nor any part thereof has not been paid and remains wholly due and owing to plaintiff.

XVI.

That under and by virtue of the provisions of said insurance contract, Sam Richardson, also known as Sam G. Richardson, was an additional insured. That as of April 9, 1946, said contract among other things insured Sam G. Richardson and provided that said

insurer would pay judgments, costs taxed against the insured in a legal proceeding, together with interest accruing on judgments resulting from litigation until the payment thereof.

XVII.

That plaintiff is informed and believes and thereupon alleges [10] that all conditions and requirements of said insurance contract have been complied with, excepting the defendants or the said insurer, Royal Indemnity Company, making the payments due thereunder as demanded herein.

XVIII.

That hereinbefore plaintiff has caused to be made a demand upon said insurer for the payment of said judgment, together with interest and costs, which demand has been refused and the same is now wholly due and owing to plaintiff.

And for a further, Second and separate cause of action against the defendants, and each of them, plaintiff alleges as follows:

I.

Plaintiff refers to all of his first cause of action and incorporates the same herein, as though fully set forth at this point.

II.

That plaintiff is informed and believes and thereupon alleges that prior to April 9, 1946, defendants

had, for a valuable consideration, entered into a written insurance contract with Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the estate of Harry E. Blodgett, deceased, Roy R. Jordan as aforesaid executor of the said estate or as testamentary trustee of said estate.

That said insurance contract or contracts provided that said defendant or defendants would insure Harry E. Blodgett, Blodgett's Auto Service, Blodgett's Auto Service and Tours, the estate of Harry E. Blodgett, deceased, and Roy R. Jordan as said executor or trustee, and any other person against loss by reason of liability imposed by law upon each or any of them for damages because of bodily injury or destruction of property sustained by any person or persons, caused by and arising out of the use of the automobiles as scheduled in said policy. That a Packard automobile, herein described, was scheduled in said insurance contract as a vehicle covered by the terms of said contract, and on April 9, 1946, was an asset of and owned by Blodgett's Auto Service, Blodgett's Auto Service and Tours, and the estate of Harry E. Blodgett, deceased. [11]

III.

That said contract or contracts were on April 9, 1946, in full force and effect.

Wherefore, plaintiff prays judgment for the sum of $31,014.00, together with interest thereon at the rate of 7% per annum from the 12th day of September, 1946, until paid, and for plaintiff's costs

incurred herein, and such other and further relief as may seem just and equitable in the premises.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

State of California,
County of Los Angeles—ss.

George N. Olmstead, being by me first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing Amended Complaint—Money Due on Contract and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE N. OLMSTEAD.

Subscribed and sworn to before me this 19th day of September, 1949.

[Seal] /s/ JOHN E. SISSON,
Notary Public in and for
Said County and State. [12]

Exhibit A

Comprehensive Liability Policy
Combination Automobile and General Liability
Form (Pacific Coast)

Royal Indemnity Company

Head Office: New York 8, N. Y. 150 William Street

J. F. O'Loughlin, President

Duplicate Original Policy

CRX 100219

Issued to: Blodgett's Auto Service & Tours.

Expiration: February 16, 1947.

Total Premium: $2503.96.

Please Read Your Policy

Every accident, however slight, should be reported immediately to the agent or company.

ROY JORDAN, INC.

Insurance in all its Branches, 740 E. Colorado St., Pasadena (1), Calif., SY 6-5348, RY 1-6491.

Comprensive Liability Policy

Combination Automobile and General Liability Form (Pacific Coast)

Royal Indemnity Company

Head Office New York A New York Corporation

Royal Indemnity Company

Declarations

Item 1

Name of Insured: H. E. Blodgett, D.B.A. Blodgett's Auto Service & Tours.

Address: Green Hotel, Corner of Green and Raymond Streets, Pasadena, Los Angeles County, California.

Business of the Named Insured is: Private Livery, Public Livery, U-Drive.

Named Insured is (Individual, Corporation or Partnership): Individual.

Item 2

Policy Period: From February 16, 1946, to February 16, 1947, 12:01 a.m., standard time at the address of the named insured as stated herein.

Item 3

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto. [13]

Coverages	Limits of Liability			Advance Premiums
	Each Person	Each Accident	Aggregate Products	
A—Bodily Injury Liability	$15,000.00	$30,000.00	Not Covered	$2,120.67
	Each Accident			
B—Property Damage Liability—Automobile	$ 5,000.00	* * * * *	* * * * *	383.29
	Each Accident	Aggregate Operations	Aggregate Protective	
C—Property Damage Liability—Except Automobile	$.....	$.....	$.....	(none)
	Aggregate Products	Aggregate Contractual		
	$.....	$.....	* * * * *	

Endorsements attached to policy at issuance.

Total Advance Premium.....$2,503.96

If Policy Period is more than one year premium is payable: On effective date of Policy $..... 1st Anniversary $..... 2nd Anniversary $.....

Item 4

During the past year no insurance has canceled any similar insurance issued to the named insured, except as herein stated:

No Exceptions

Countersigned at Los Angeles, California.

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

Page One

Royal Indemnity Company

(A stock insurance company, herein called the company)

Agrees With the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

Insuring Agreements

I.

Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason

of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons and caused by accident.

Coverage B—Property Damage Liability—

Automobile

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising [14] out of the ownership, maintenance or use of any automobile.

Coverage C—Property Damage Liability—

Except Automobile

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages because of the injury to or destruction of property, including the loss of use thereof, caused by accident.

II.

Defense, Settlement, Supplementary Payments

As respects such insurance as is afforded by the other terms of this policy the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(c) pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage A of this policy. The company's liability under this insuring agreement with

respect to each bond shall not exceed the usual charges of surety companies for such bond nor $100;

(d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

III.

Definition of "Insured"

The unqualified word "insured" includes the named insured and also includes (1) under coverages A and C, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining, and (2) under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured, and any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement: [15]

(a) To injury to or sickness, disease or death of any person who is a named insured;

(b) with respect to an automobile while used with any trailer not covered by like insurance in the company; or with respect to a trailer while used with any automobile not covered by like insurance in the company;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer;

(e) with respect to any hired automobile, to the owner thereof or any employee of such owner;

(f) with respect to any non-owned automobile, to any executive officer if such automobile is owned in full or in part by him or a member of his household.

IV.

Policy Period, Territory

This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, Canada or Newfoundland. With respect to automobiles this policy also applies to accidents which occur during

the policy period while the automobile is being transported between ports thereof.

Exclusions

This policy does not apply:

(a) to liability assumed by the insured under any contract or agreement not defined herein;

(b) under coverages A and C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) watercraft while away from premises owned, rented or controlled by the named insured, or (2) aircraft;

(c) under Coverage A, except with respect to liability assumed under contract covered by this policy to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured, other than a domestic employee whose injury arises out of the maintenance or use of an automobile covered by this policy while such employee is not engaged in the operation, maintenance or repair thereof, or to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(d) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(e) under coverage C, except with respect to operations performed by independent contractors, to the ownership, maintenance or [16] use of auto-

mobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining;

(f) under coverage C, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured, or (3) any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises;

(g) under coverage C, except with respect to liability assumed under contract covered by this policy and except in so far as this exclusion is stated in the policy to be inapplicable, to (1) the discharge, leakage or overflow of water or steam from plumbing, heating, refrigerating or air-conditioning systems, elevator tanks or cylinders, standpipes for fire hose, or industrial or domestic appliances, or any substance from automatic sprinkler systems, (2) the collapse or fall of tanks or the component parts or supports thereof which form a part of automatic sprinkler systems, or (3) rain or snow admitted directly to the building interior through defective roofs, leaders or spouting, or open or defective doors, windows, skylights, transoms or ventilators, in so far as any of these occur on or from premises owned or rented by the named insured and injure or destroy buildings or contents thereof.

Conditions

The conditions, except conditions 4, 5, 6 and 8, apply to all coverages. Conditions 4, 5, 6 and 8 apply only to the coverage or coverages noted thereunder.

1. Premium

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insurer. When used as a premium basis:

(1) the word "remuneration" shall mean the entire remuneration earned during the policy period by all employees of the named insured, other than drivers of teams or automobiles subject with respect to each executive officer to a maximum and a minimum remuneration of $100 and $30 per week, and the remuneration of each proprietor at a fixed amount of $2,000 per annum;

(2) the word "receipts" shall mean the gross amount of money, including taxes, charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipts basis;

(3) the word "cost" shall mean the total cost of all operations performed for the named insured during the policy period by independent contractors in each separate project, including materials used or delivered for use, except maintenance or ordinary alterations and repairs of premises owned or rented by the named insured; [7]

(4) the word "sales" shall mean the gross amount of money, including taxes, charged for all goods and products sold or distributed during the policy period by the named insured or by others trading under his name;

(5) the words "cost of hire" shall mean the amount incurred for hired automobiles, including remuneration of the named insured's chauffeurs employed in the operation of such automobiles;

(6) the words "Class 1 persons" shall mean the following persons, provided their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers, of the named insured compensated for the use of such automobiles by salary, commission, terms of employment, or specific operating allowance of any sort; (b) all direct agents and representatives of the named insured;

(7) the words "Class 2 employees" shall mean all employees, including officers, of the named insured, not included in Class 1 persons.

The named insured shall maintain for each hazard records of the information necessary for premium computation.

2. Inspection and Audit

The company shall be permitted to inspect the insured premises, operations, automobiles and elevators and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

Attach Riders Here

Comprehensive General Liability
(Pacific Coast)

Overtime Remuneration Endorsement

It is agreed that the earned premium shall be computed in accordance with the Premium Condition of the policy and the following additional provisions:

1. If the named insured's books are maintained so as to show separately, by employee and by classes of work,

(a) the remuneration earned at regular rates of pay for total hours worked, and

(b) extra remuneration earned for overtime

the remuneration upon which premium for the policy is based shall include all remuneration specified in subdivision (a) foregoing and shall not include any of the remuneration specified in subdivision (b) foregoing.

2. If the named insured's books are maintained so as to show separately, by employee and by classes of work,

(a) the remuneration earned at regular rates of pay for those hours worked when there is no overtime, and

(b) the remuneration earned at regular rates of pay and for overtime for those hours worked when there is overtime [18] the remuneration upon which the premium for the policy is based shall include all remuneration specified in subdivision (a) and two-thirds of the remuneration specified in subdivision (b) foregoing.

3. "Overtime" means those hours worked when there is an increase in rate of pay because of holidays, Saturdays, Sundays, the number of days worked in any one week, or the number of hours worked in any one day.

4. This endorsement is not applicable to remuneration earned for stevedoring operations.

Attached to and hereby made a part of Policy No. CRX-100219 issued by the Company to Blodgett's Auto Service & Tours.

F. S. PERRYMAN,
Secretary.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

CL20663-2M-12-45 Ed. 7-45 Printed in U.S.A.

Comprehensive General Liability
(Pacific Coast)

Exclusion of Products Hazard

It is agreed that the policy does not apply:

1. to the products hazard as defined in the policy,

2. to a warranty of goods or products within the policy definition of the word "contract" if the accident occurs after the insured has relinquished possession thereof to others and

(a) away from premises owned, rented or controlled by the insured, or

(b) on such premises for which the classification stated below or in the company's manual excludes any part of such products hazard.

Classification:

Attached to and hereby made a part of Policy No. CRX-100219 issued by the Company to Blodgett's Auto Service & Tours.

F. S. PERRYMAN,
Secretary.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

CL20660-5M-10-45 Ed. 7-45 Printed in U.S.A.

Addt'l. Prem. Endorsement No. 296060
Return Prem.
Important: Please attach to Policy Contract.

In consideration of the premium for which this policy is [19] written, it is hereby understood and agreed that coverage is also provided for personal, pleasure, family and business use.

This endorsement shall take effect at 12:01 A. M. February 16, 1946.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Countersigned:

C. H. THOMPSON,

By HARRIETT C. WATTERS,
Authorized Representative.

R20029 80M Sets 8-44 Printed in U.S.A.

Public Automobiles—Earnings Basis

(Owned or Hired Automobiles)

It is understood and agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies with respect to all owned automobiles and hired

automobiles used for the purposes stated as applicable thereto in the schedule forming a part hereof, subject to the following provisions:

1. Definitions. "Owned automobile" shall mean an automobile owned in full or in part by the named insured. "Hired automobile" shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

2. Application of Insurance. The insurance does not apply to the owner of any hired automobile or any employee of such owner.

Schedule

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges.

Premium Basis—Gross Earnings

Purposes of Use	Estimated Annual Gross Earnings	Rate per $100 of Gross Earnings		Advance Premiums	
		Coverage A	Coverage B	Coverage A	Coverage B
1. Private Livery	Varies	$4.25	$ .68	$797.00	$164.50
2. U-Drive Driverless Car	$1500.00	8.37	1.4	1255.50	210.00
			Total Advance Premiums (Included in Policy $ Premium)		

	Trade Name	Seating Cap.	Year	Serial No.	Engine No.
1.	Buick	Sedan	1940	13681232	53866333
2.	Cadillac	Sedan	1940	3111642	3111642
3.	Packard	Sedan	1941	D35521C	424607
4.	Packard	Sedan	1940	138240008	59614
5.	Buick	Sedan	1942	44620834	24312825
6.	Mercury	Coupe	1940		99-A241627
7.	Chevrolet	Sedan	1941	2AH1113199	AA187881
8.	Chevrolet	Sedan	1941	AA118064	6AH106812
9.	Packard	Sedan	1940	1372-3272	C503580
10.	Chevrolet	Sedan	1941	6AG0215316	AA504023
11.	Packard	Sedan	1942	1592-5303	E305360
12.	Packard	Sedan	1941	D11922	DE1484-2186
13.	Chevrolet	Sedan	1941	5AH-10-8846	AA153798
14.	Buick	Sedan	1940	23605373	53831748
15.	Packard	Sedan	1939	1272-3485	B-504272
16.	Chevrolet	Sedan	1941	1AH-06-47061	AA954816
17.	Plymouth	Sedan	1942	11430139	P14-426459
18.	Chevrolet	Sedan	1940	21KA-06-40019	3534460

The other provisions of this endorsement are printed on the back of this sheet and are a part of this endorsement.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

C. H. THOMPSON.

Countersigned:

By HARRIETT C. WATTERS,
Authorized Representative.

R20346 2M 1-44 Rev. 1-44 Printed in U.S.A.
formerly 10276 Standard

3. Premium. The named insured shall pay to the company at the effective date of the policy the advance premium stated in the schedule. On or before the twentieth day of each month, the named insured shall render to the company a statement showing the total gross earnings of all licensed automobiles covered by the policy during the preceding calendar month, and the premium applicable to such total gross earnings shall be payable to the company at once. Upon termination of the policy, the earned premium for such automobiles shall be computed by the application of the earnings rates stated in the schedule to the amount of total gross earnings during the policy period of all such automobiles, but such premium shall not be less than the minimum premium herein provided. If the earned premium thus computed exceeds the premium paid for such automobiles, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

The minimum premium for owned automobiles shall be 75% of the total of the individual specified car premiums for the classification designated in the schedule, stated in the Automobile Casualty Manual in use by the company on the effective date of the policy, including 75% of the pro rata of such annual premium for each automobile owned for a shorter time than the total policy period. The minimum premium for hired automobiles shall be as stated in the schedule.

4. Records. The named insured shall maintain for the policy [21] period the following chronological record with respect to each such automobile:

A. Owned Automobiles.

(1) place of principal garaging;
(2) the year of model, trade name, model, body type (seating capacity, if bus), serial number, motor number, and purpose of use;
(3) the date of acquisition of each such automobile acquired by the named insured during the policy period;
(4) the date of sale or disposition of each such automobile sold or disposed of by the named insured during the policy period.

B. Hired Automobiles.

(1) place of principal use by the named insured;
(2) number and type;
(3) periods of use by the named insured;
(4) the names of the owners or lessees of such automobiles.

C. The total gross earnings during the policy period for all such automobiles.

The named insured shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

5. Inspection and Audit. The company shall be permitted to inspect such automobiles and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of the policy, as far as they relate to the premium basis or the subject matter of this insurance.

6. Declarations. The named insured declares that the policy contains a complete list of all such automobiles owned, leased or hired by him at the effective date of the policy.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this policy, except as herein stated, nor shall this endorsement bind the company until countersigned by a duly authorized representative of the company.

In witness whereof the Royal Indemnity Company has caused this endorsement to be signed by its president and countersigned on the other side of this sheet by a duly authorized representative.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Addt'l. Prem. Endorsement No. 60253
Return Prem.

Important: Please attach to Policy Contract.

It is hereby understood and agreed that notwithstanding expressions inconsistent with or contrary thereto, in this policy or any endorsement thereto contained, this policy is specifically issued to cover passenger-carrying automobiles rented or leased [22] in the City of Pasadena, or which the owner uses or allows or permits to be used as drive-ur-self vehicles on the streets of the City of Pasadena.

Wherever the term "Assured" or "Insured" is used in the bodily injury liability coverage and in other parts of this policy when applicable to such coverage, it shall include the driver of any vehicle insured hereunder when driving said vehicle with the consent, express or implied, of the named "Assured" or "Insured"; and in the event that a final judgment for any loss or claim under this policy is rendered against the owner and/or driver of such automobile, the Insurer guarantees payment direct to the plaintiff, securing such judgment of that part of said judgment which is within the limits expressed in the policy, irrespective of the financial responsibility of the assured, and for the purpose of enforcing this guarantee, an action may be commenced and maintained against the insurer by any such plaintiff.

It is hereby understood and agreed that the insurance policy to which this endorsement is attached will not be cancelled by the insurer or at the request

of the insured until the City of Pasadena, care of City Manager, City Hall, Pasadena, California, shall have notice in writing at least ten (10) days immediately prior to the time when such cancellation shall become effective.

This endorsement shall take effect at 12:01 A. M. February 16, 1946.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative,
Royal Indemnity Company.

R20030 20M Sets 2-45 Printed in U.S.A.
Addt'l. Prem. Endorsement No. 60256
Return Prem.

Important: Please attach to Policy Contract.

In consideration of the premium charged, the Policy to which this endorsement forms a part is

hereby extended subject to its terms and conditions to cover the operation of private passenger automobiles owned by the insured and driven by persons other than the named insured or his employees in a U-Drive Rental Service.

The premiums for this extended coverage shall be based on the gross eaernings for such U-Drive driverless car operations and shall be computed at the rates given below per $100.00 of such earnings. "The U-Drive Driverless Car Earnings" shall be the total amount charged by the insured, whether collected or not. Upon termination of this policy the amount of such earnings shall be exhibited to the company and the earned premiums computed at the rates and under the terms of this endorsement. If the earned premiums thus computed is greater than the advance premiums paid, the insured shall pay the additional amount to the company; if less, the company shall return to the insured the unearned portion but, except in the event of cancellation [23] the company shall retain the minimum premiums set forth in this endorsement.

The minimum premiums for the coverage provided by this endorsement and for the coverage provided under Division 2 "U-Drive Driverless Car" combined shall be Ninety-Five and 18/100 Dollars ($95.18-P.L.) and Eighteen and 75/100 Dollars ($18.75-P.D.) on the annual basis for each automobile owned by the insured for use in such operations. It is warranted by the insured that a total of Eighteen (18) automobiles are owned and so used at the inception date of this policy. The

insured agrees to maintain a complete and accurate record of all such automobiles for the purpose of determining the minimum premiums at the end of the policy period.

The following schedule contains statements and declarations made by the named insured and sets forth the rates applicable to the coverage provided by this Endorsement.

Estimated Total Remuneration

$15000.00

Rates Per $100.00

$9.30-P.L.

$1.50-P.D.

This endorsement shall take effect at 12:01 A. M. February 16, 1946.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY,
J. F. O'LAUGHLIN,
President.

Countersigned:

C. H. THOMPSON,

By .....
Authorized Representative.

R20030 20M Sets 2-45 Printed in U.S.A.

Comprehensive Personal Liability Endorsement
Exclusion of Residence Employees

It is agreed that the policy does not apply with respect to injury to or sickness, disease or death of any residence employee of an insured while engaged in the employment of said insured.

This endorsement shall take effect on February 16, 1946, at 12:01 A. M., standard time.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued by the Company to Blodgett's Auto Service & Tours.

F. S. PERRYMAN,
Secretary.

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

CL71 10M 6-44 Ed. 6-44 Printed in U.S.A. [24]

Comprehensive Liability Endorsement
Individual as Named Insured

(Application of Policy to Non-Business Pursuits of the Named Insured and Family)

This Endorsement Does Not Apply to Automobile Coverages.

1. It is agreed that the policy applies to non-business and non-occupational pursuits of the insured, subject to the following provisions:

Insuring Agreements

1. Insuring Agreement I is amended to read:
Coverage A—Liability

(Bodily Injury, Property Damage and Employers')

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or the liability of others assumed by him under written contract relating to the premises, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, and for damages because of injury to or destruction of property, including the loss of use thereof.

Coverage B—Medical Payments
(Premises and Employees)

To pay to or for each person who sustains bodily injury, sickness or disease, caused by an accident, while on the premises with the permission of an insured, or while elsewhere (1) if the accident arises out of the premises or a condition in the ways immediately adjoining or is caused by an animal

owned by an insured, or (2) if the injury is sustained by a residence employee while engaged in the employment of the insured, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, sickness or disease, the reasonable funeral expense, all incurred within one year from the date of accident.

2. Insuring Agreement II applies only to Coverage A.

3. Insuring Agreement III is amended to read:
Definition of "Insured"
The unqualified word "insured" includes the named insured and also includes, if residents of his household, his spouse and relatives of either and, with respect to any animal owned by an insured, any person or organization legally responsible therefore. The insurance with respect to any insured, other than the named insured or spouse, does not apply under coverage A to injury to or death of any employee of said insured while engaged in his employment, unless assisting him in his personal sports activities.

4. Insuring Agreements IV is amended to read:
Policy, Period, Accidents
This policy applies only to accidents during the policy period. [25]

Exclusions

The exclusions are amended to read:

(a) to any act or omission in connection with

other premises owned, rented or controlled by an insured; or to the rendering of any professional service or the omission thereof;

(b) to the ownership, maintenance or use, including loading and unloading, of (1) motor vehicles, trailers or semi-trailers while away from the premises or the ways immediately adjoining, (2) watercraft, other than canoes or rowboats, exceeding twenty-one feet in over-all length or inboard motor boats, owned by or rented to an insured, while away from the premises, or (3) aircraft; but, with respect to injury sustained by a residence employee while engaged in the employment of the insured, parts (1) and (2) of this exclusion do not apply, and part (3) applies only while such employee is engaged in the operation or maintenance of aircraft;

(c) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(d) under coverage A, to injury to or destruction of (1) property used by, rented to or in the care, custody or control of the insured, or (2) premises alienated by an insured out of which the accident arises;

(e) under Coverage B, to bodily injury to or sickness, disease or death of (1) any person to or for whom benefits therefor are payable under any workmen's compensation law; (2) any insured; or (3) any person, other than a residence employee, if such person is regularly residing on the premises, or is on the premises because of a business con-

ducted thereon or is injured by an accident arising out of such business.

Conditions

1. Conditions captioned "Notice of Accident," "Changes," "Assignment," "Cancelation," and "Declarations" apply to coverages A and B. Conditions captioned "Notice of Claim or Suit," "Assistance and Cooperation of the Insured," "Action Against Company," "Other Insurance" and "Subrogation" apply only to coverage A. No other condition of the policy applies to either coverage A or B.

2. Definitions

(a) Premises.

The unqualified word "premises" means (1) all premises where the named insured or his spouse maintains a residence and includes garages and stables incidental thereto and individual or family cemetery plots or burial vaults, except business property and farms, and (2) premises in which an insured is temporarily residing, if not owned by an insured, and vacant land owned by or rented to an insured, other than farm land.

"Business property" includes (1) property on which a business, other than that specifically declared in this endorsement, is conducted, and (2) property rented in whole or in part to others, or held for such rental, by the insured

other than (a) the insured's residence if rented occasionally or if a two-family dwelling usually occupied in part by the insured or (b) such [26] garages or stables, if not more than three car spaces or stalls are so rented or held.

(b) Residence Employee.

"Residence employee" means an employee of the named insured or his spouse whose duties are incidental to the ownership, maintenance or use of the premises, including the maintenance or use of automobiles or teams, or who performs duties of a similar nature not in connection with the insured's business.

The other provisions of this endorsement are printed on the back of this sheet and are a part of this endorsement.

(c) Accident:

"Accident" wherever used in connection with coverage A includes a continuous or repeated exposure to conditions, which results in injury during the policy period, provided the injury is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one accident.

(d) Assault and Battery.

Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

3. Limits of Liability

The limit of liability stated in this endorsement for coverage A is the limit of the company's liability for all damages arising out of any one accident.

The limit of liability stated in this endorsement for coverage B is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

4. Medical and Other Reports; Examination—Coverage B

The injured person or someone on his behalf shall, as soon as practicable after each request from the company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

5. Proof and Payment of Claim—Coverage B

As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the

first, the injured person or someone on his behalf shall give to the company written [27] proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefore and the amounts paid thereon. Upon the company's request, the injured person or someone on his behalf shall cause to be given to the company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The company shall have the right to make payment at any time to the injured person or to any such person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

6. Action Against Company—Coverage B

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this insurance, nor until thirty days after the required proofs of claim have been filed with the company.

Schedule

The named insured declares that:

1. The principal residence premises designated below are the only premises where the named insured or spouse maintains a residence, other than business property and farms, except as herein stated: No Exceptions.

2. The named insured or spouse is not conducting any business or occupational pursuits at the premises, except as herein stated: No Exceptions.

3. The number of residence employees of named insured or spouse is: None full time: If Any part time. The hours per week worked by each part time employee are Less Than ½ Full Time.

4. The principal residence premises are located at 606 Meridian Avenue, South Pasadena, California.

Limits of Liability

Coverage A $15,000.00 each accident. Coverage B $250.00 each person (Medical Payments).

2. It is further agreed that the policy does not apply: (1) to any business or occupational pursuits of an insured, except in connection with the conduct of a business of which the named insured is the sole owner; or (2) to the rendering of any professional service or the omission thereof.

This endorsement shall take effect at 12:01 A.M. (time of day), February 16, 1946 (date).

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions

of this Policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of [28] Policy No. CRX-100219 issued to Blodgett's Auto Service & Tours.

ROYAL INDEMNITY
COMPANY

Countersigned:

C. H. THOMPSON,
By HARRIETT C. WATTERS,
Authorized Representative.

R20473 4M 12-44 Ed. 6-44 Printed in U.S.A.

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3. Definitions (a) Contract. The word "contract" shall mean a warranty of goods or products or, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement.

(b) Automobiles. The word "automobile" shall mean a land motor vehicle, trailer or semitrailer, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work,

other than a concrete mixer of the mix-in-transit type. The word "trailer" shall include semitrailer. Use of an automobile includes the loading and unloading thereof.

"Owned automobile" shall mean an automobile owned in full or in part by the named insured.

"Hired automobile" shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned automobile" shall mean any other automobile.

The terms of this policy shall apply separately to each automobile insured hereunder but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

(c) Products Hazard. The term "products hazard" shall mean

(1) The handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises

for which the classification stated in the company's manual excludes any part of the foregoing;

(2) operation, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except (a) pick-up and delivery, (b) the existence of tools, uninstalled equipment and abandoned or unused materials and (c) operations for which the classification stated in the company's manual specifically includes completed operations; [29] provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

(d) Assault and Battery. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

4. Limits of Liability—Coverage A

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total

limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

5. Limits of Liability—Products Coverages A and C

The limits of bodily injury liability and property damage liability stated in the declarations as "aggregate products" are respectively the total limits of the company's liability for all damages arising out of the products hazard. All such damages arising out of one prepared or acquired lot of goods or products shall be considered as arising out of one accident.

6. Limits of Liability—Coverage C

The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the ownership, maintenance or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis.

The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by opera-

tions performed for the named insured by independent contractors or omissions or supervisory acts of the insured in connection therewith, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured.

The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.

7. Limits of Liability

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability. [30]

8. Financial Responsibility Laws—Coverages A and B

Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of lia-

bility stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. Notice of Accident

When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

10. Notice of Claim or Suit

If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

11. Assistance and Cooperation of the Insured

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

12. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

13. Other Insurance

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, [31] however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall

be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise.

14. Subrogation

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

15. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by the President, a Vice-President, or a Secretary of the company and countersigned by an authorized representative of the company.

16. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy unless canceled, shall if written notice be given to the company within sixty

days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of any owned automobile or hired automobile, as an insured, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

17. Cancelation

This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancela-

tion becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

18. Declarations

By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued [32] in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, the Royal Indemnity Company has caused this policy to be signed by its president and secretary at New York, N. Y., and countersigned on the declarations page by a duly authorized representative of the company.

J. F. O'LOUGHLIN,
President.
JAS. B. CLANCY,
Secretary.

No. 18416

INCREASED LIMITS OF LIABILITY

Important: Please Attach to Policy Contract

To Be Determined

In consideration of an Additional Premium of $ By Audit, the limits of liability as expressed in Item 3 of the declarations of this policy are amended to read as follows:—

Coverages		Limits of Liability
A. Bodily Injury Liability	$ 50,000.00	Each Person
	$100,000.00	Each Accident
B. Property Damage Liability	$ 10,000.00	Each Accident

Approved as to Form:

H. BURTON NOBLE,
City Attorney.

By ROYAL M. SORENSON,
Deputy City Attorney.

Dated Aug. 27, 1946.

This endorsement shall take effect on July 17th, 1946, at 12:01 a.m. standard time.

Nothing herein contained shall be held to waive, alter, vary or extend any of the terms or provisions of this Policy, except herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

Attached to and hereby made a part of Policy No. CRX-100219 issued to Roy Jordan, et al.

ROYAL INDEMNITY
COMPANY,
J. F. O'LOUGHLIN,
President.

Countersigned:

C. H. THOMPSON,
By EDNA BANNA,
Authorized Representative.

R20207A 3M Sets 4-45 Rev. 4-45 Printed in U.S.A.

Receipt of copy acknowledged.

[Endorsed]: Filed January 3, 1950. [33]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant, Royal Indemnity Company, a corporation, and for answer to the amended complaint on file herein admits, denies and alleges:

First Cause of Action

I.

Answering paragraph II this defendant denies generally and specifically each, every and all of the allegations contained in the second sub-paragraph thereof.

II.

Answering paragraph VIII this defendant denies generally and specifically each, every and all of the allegations contained in the third and last sub-paragraph thereof.

III.

Answering paragraph IX defendant has no information or belief sufficient to enable it to answer the allegation that [35] said automobile was in the possession of Sam G. Richardson on April 9, 1946, and basing its denial on that ground, denies said allegation.

IV.

Denies generally and specifically each and every allegation contained in paragraph X.

V.

Answering paragraph XI defendant has no in-

formation or belief sufficient to enable it to answer the allegation that Sam G. Richardson drove the Packard automobile, or any other vehicle, into and upon plaintiff, as alleged in plaintiff's amended complaint and basing its denial on that ground, denies said allegation; further answering said paragraph, defendant admits that plaintiff prosecuted an action against Sam G. Richardson in Superior Court case number 516890 but in this connection defendant alleges that the said Sam G. Richardson did not notify defendant or the named assureds that he had ever been served with summons and complaint in said action; further, that defendant is informed and believes and thereupon alleges that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of damages and that no testimony was introduced on behalf of the said Sam G. Richardson and that judgment was entered in said action against him by default.

VI.

Defendant has no information or belief upon which to answer the allegations contained in paragraphs XII and XV and upon that ground denies every allegation therein contained.

VII.

Answering paragraph XIII this defendant admits that prior to the alleged date it had notice of the purported collision accident and the claims and alleged suit of the plaintiff; further answering the

said paragraph denies each, every and all of [36] the remaining allegations therein contained.

VIII.

Denies generally and specifically each and every allegation contained in paragraphs XIV, XVI and XVII.

IX.

Answering paragraph XVIII defendant denies that there is now due and owing to the plaintiff by this defendant payment of said judgment, or any other judgment, together with interest and costs, or that there ever was or is due or owing from this defendant to plaintiff any sum or sums whatsoever.

Second Cause of Action

I.

Answering paragraph I of the Second Cause of Action, defendant incorporates by reference and makes a part hereof as though fully set forth herein, all the allegations contained in paragraphs I to IX, inclusive, of its answer to the First Cause of Action.

II.

Answering paragraph II plaintiff alleges that it was provided in said insurance contract that as one of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of

witnesses and in the conduct of suits; and alleges that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant in the securing of the information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court [37] action number 516890, and failed to deliver same to defendant or to request defendant to defend said action; that the said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint.

For a Second, Separate and Distinct Affirmative Defense to Both Causes of Action, Defendant Alleges:

I.

Incorporates by reference with the same force and effect as though herein set out, all the denials and allegations of its first defense.

II.

That the policy of insurance referred to in plaintiff's amended complaint provided that the insur-

ance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit "A" and hereby made a part hereof, and among other things, provides that the insureds shall at all times render to this defendant all cooperation and assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds [38] that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this

defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this defendant.

Wherefore, this answering defendant prays that plaintiff take nothing by his complaint, that this defendant have judgment for its costs herein incurred, and for such other and further relief as to the court may seem proper.

TRIPP & CALLAWAY,
By /s/ F. V. LOPARDO.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 3, 1950. [39]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS

(Pursuant to Rule 36, Federal Rules as Amended)

Plaintiff requests defendant, Royal Indemnity Company, within ten (10) days after service of this Request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the hearing of this cause.

I.

That each of the following statements of fact is true:

(1) That the 1940 Packard automobile, motor number C59614, California license number 10 L 343, was on April 9, 1946, in the possession of Sam Richardson also known as Sam G. Richardson as referred to in paragraph number IX of plaintiff's amended complaint.

(2) That Sam G. Richardson drove, operated and used said vehicle on April 9, 1946.

(3) That as of April 9, 1946, Sam G. Richardson had permission and consent of Roy R. Jordan as executor of the Estate of [41] Harry E. Blodgett, deceased, or as testamentary trustee of Harry E. Blodgett, or Blodgett's Auto Service, or Blodgett's Auto Service and Tours, or Harry E. Blodgett as referred to in paragraph X of plaintiff's amended complaint.

(4) That Sam G. Richardson drove, operated and used said vehicle on April 9, 1946, with the permission and consent of Roy R. Jordon as executor of the Estate of Harry E. Blodgett, deceased, or as testamentary trustee of Harry E. Blodgett, or of Blodgett's Auto Service, or of Blodgett's Auto Service and Tours, or of Harry E. Blodgett as referred to in paragraph X of plaintiff's amended complaint.

(5) That the said vehicle on April 9, 1946, was the vehicle involved in a collision accident with the plaintiff as referred to in paragraph XI of plaintiff's amended complaint.

(6) That the said collision accident and the

injuries resulting therefrom was the occasion and incident giving rise to plaintiff's said cause of action and judgment rendered thereon in the said Superior Court action referred to in plaintiff's amended complaint, as all referred to in paragraph XI in plaintiff's amended complaint.

(7) That on April 9, 1946, Sam Richardson, also known as Sam G. Richardson, drove said vehicle into and upon plaintiff as referred to in paragraph XI of plaintiff's amended complaint.

(8) That on April 9, 1946, Sam Richardson, also known as Sam G. Richardson, and said vehicle were at the place and at the time of the said collision accident, as referred to in paragraph XI of plaintiff's amended complaint.

(9) That the rental memorandum of Blodgett's Auto Service show that the residence of Sam Richardson to be as of April 7, 1946, 836 S. San Gabriel, San Gabriel, California.

(10) That business records as kept as original entries in the regular course of business, of the Sheriff of Los Angeles [42] County, State of California, is that Deputy Roy Carter served summons in said Superior Court action on Sam G. Richardson on the 3rd day of August, 1946, at 836 South San Gabriel, San Gabriel, California.

(11) That on June 7, 1946, George N. Olmstead in the Superior Court of the State of California in and for the County of Los Angeles filed suit No. 515192 against Sam G. Richardson, Harry E. Blodg-

ett, John Doe and Doe Company, a corporation, and Doe and Roe, a co-partnership, as the fictitious names of defendant, Harry E. Blodgett, and therein alleged in paragraph numbered VIII of his complaint "that defendant Harry E. Blodgett also known as H. E. Blodgett, doing business under the fictitious firm name of Blodgett's Auto Service or Blodgett's Rental Service was at all times mentioned herein the owner of the 1940 Packard automobile referred to herein; that defendant Sam G. Richardson was using and operating said automobile at the time and place mentioned herein with the permission, consent and acquiescence of the said defendant, Harry E. Blodgett," and that thereafter defendant herein on behalf of Roy Jordan as executor for the Estate of Harry E. Blodgett, deceased, by verified answer on June 27, 1946, admitted the allegations contained in the quotations hereinabove set forth; that the plaintiff in said suit, the injuries and damages claimed from an accident and the time and place thereof aforementioned are the same and identical as the plaintiff, the injuries and claimed damages from an accident and time and place thereof as that alleged in plaintiff's suit filed July 18, 1946, in the Superior Court of the State of California, in and for the County of Los Angeles, No. 516890 against Sam G. Richardson, Roy Jordon as Executor of the Estate of Harry E. Blodgett, deceased.

(12) That on April 17, 1947, this defendant as insurer for the representative of the Estate of Harry E. Blodgett, deceased, agreed in open court

to a stipulated judgment against said estate [43] and thereafter paid to plaintiff herein and therein the sum of Three Thousand Five Hundred Dollars ($3,500.00) and received a satisfaction of judgment against said estate.

(13) That defendant received full payment of the premium charged for the insurance contract attached to plaintiff's amended complaint as Exhibit "A."

(14) That defendant received due and full co-operation and notice from Roy R. Jordon as executor of Estate of Harry E. Blodgett, deceased, in connection with occurrance of collision accident and suit referred to in plaintiff's amended complaint.

(15) That the Packard vehicle described in plaintiff's amended complaint was on or about April 7, 1946, rented by Blodgett's Auto Service or Blodgett's Auto Service and Tours in the City of Pasadena, County of Los Angeles, State of California, to Sam Richardson, also known as Sam G. Richardson, for the purpose of his using said vehicle as a passenger carrying automobile for an initial term expiring April 14, 1946.

(16) That the insurance contract referred to as Exhibit "A" in plaintiff's amended complaint was and is, as to the endorsement set out at Page 10, lines 29 through 32, inclusive, and Page 11, line 1, through 20, inclusive, typewritten; and that the provisions of said policy, as to the contents shown on Page 2, lines 20 through 32, inclusive; Page 3,

lines 1 through 34, inclusive; Page 4, lines 1 through 32, inclusive; Page 5, lines 1 through 33, inclusive; Page 6, lines 1 through 17, inclusive; Page 13, lines 1 through 33, inclusive; Page 14, lines 1 through 33, inclusive; Page 15, lines 1 through 32, inclusive; Page 16, lines 1 through 14, inclusive; Page 19, lines 1 through 32, inclusive; Page 20, lines 1 through 32, inclusive; Page 21, lines 1 through 5, inclusive, are printed words, phrases, sentences and paragraphs contained in said policy.

Dated this 15th day of February, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintif.

Receipt of copy acknowledged.

[Endorsed]: Filed February 15, 1950. [44]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANT'S ANSWER TO AMENDED COMPLAINT, FOR SUMMARY JUDGMENT ON THE PLEADINGS

(Rule 12 f, Rule 56 of Federal Rules as Amended)

The plaintiff moves the court as follows:

I.

To strike certain portions, herafter set out, of defendant's answer to plaintiff's amended complaint because said allegations, individually or collectively, fail to state any sufficient defense to plaintiff's

causes of action, and that said allegations are immaterial and redundant.

Specification of Portions of Defendants' Answer to Plaintiff's Amended Complaint, Sought to Be Stricken:

(a) Page 2, lines 15-23, inclusive—"but in this connection defendant alleges that the said Sam G. Richardson did not notify defendant or the named assureds that he had ever been served with summons and complaint in said action; further, that defendant is informed and believes and thereupon alleges that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of [46] damages and that no testimony was introduced on behalf of the said Sam G. Richardson and that judgment was entered in said action against him by default."

(b) Page 3, lines 20-32; Page 4, lines 1-8—"Answering paragraph II plaintiff alleges that it was provided in said insurance contract that as one of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits; and alleges that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant in the securing of information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and

in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to defendant or to request defendant to defend said action; that the said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint."

(c) Page 4, lines 18-32; Page 5, lines 1-16—"That the policy of insurance referred to in plaintiff's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit "A" and hereby made a part hereof, and among other things, provides that the insureds shall at all times render to this defendant all cooperation and [47] assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of

the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do, all to the substantial prejudice of this defendant.''

II.

For summary judgment, because the answer to plaintiff's amended complaint fails to state any sufficient defense to plaintiff's causes of action as

contained in plaintiff's amended complaint, and that plaintiff is entitled to judgment as a matter of law.

Dated: February 15, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [48]

To Tripp and Calloway, Attorneys for defendant, Royal Indemnity Company, a corporation:

Please take notice that the undersigned will bring the above motion on for hearing before this court at the court room of James M. Carter in the United States Courthouse in the City of Los Angeles on the 27th day of February, 1950, at 10:00 a.m. or as soon thereafter as counsel can be heard.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [49]

[Title of District Court and Cause.]

STATEMENT OF REASON IN SUPPORT OF MOTION

(Rule 3, d (b) Local Rules of United States District Court)

These are contractual causes of action against an insurer on an insurance liability policy, by an insured party who has received a judgment for personal injuries and property damage arising out of an automobile collision, which judgment has not been satisfied. The judgment debtor is insured under the provisions of this policy.

Plaintiff herein the injured person, is given the right to maintain such action directly against the insurer under the provisions of the policy and the laws of California and the City of Pasadena.

The policy was issued pursuant to the requirements of an ordinance of the City of Pasadena which had as its purpose protection of the public.

Such insurance is compulsory and required under local law; consequently, there are no defenses to liability on such policy as a result of any act or omission on the part of the insured [50] which may prejudice the rights of a member of the public to be benefited who is a judgment creditor.

Defenses of lack of cooperation, notice, etc., are pleaded affirmatively by the defendant insurer. Since these would be acts or omissions of the insured, such defenses are not, as a matter of law, sufficient. Hence the motion to strike these defenses and for summary judgment as there is no other genuine issue of defense.

Further, reason for these motions is that the defendant's own policy guarantees payment direct to such a judgment creditor on his judgment against the insured driver.

Dated: This 15th day of February, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [51]

[Title of District Court and Cause.]

STATEMENT OF UNCONTROVERTED FACTS

(Rule 3 (d) (2) Local Rules of United States District Court)

That defendant, Royal Indemnity Company, a corporation, issued a written liability policy, attached as Exhibit "A" to plaintiff's amended complaint, dated February 16, 1946, to a named insured designated as Harry E. Blodgett doing business as Blodgett's Auto Service and Tours, Green Hotel, Corner of Green and Raymond Streets, Pasadena, Los Angeles County, California. That prior to April 9, 1946, Harry E. Blodgett did business in said County under the name of Blodgett's Auto Service or Blodgett's Auto Service and Tours in renting passenger drive-yourself automobiles for hire.

That about February 15, 1946, Harry E. Blodgett died while residing in the County of Los Angeles, State of California, and left an estate which included said you-drive rental business and that said business had as one of its assets the Packard automobile referred to in plaintiff's amended complaint.

That soon after February 15, 1946, Roy R. Jordan petitioned for and was appointed to be the executor of the Estate of Harry E. [52] Blodgett, Deceased, and thereafter became testamentary trustee under the Last Will and Testament of Harry E. Blodgett; that Roy E. Jordon was on April 9, 1946, conducting said you-drive business as an asset of said estate.

That in conducting said business Roy R. Jordon or

the Estate rented you-drive vehicles in the City of Pasadena, County of Los Angeles, State of California, with said vehicles to be used on the public streets of said City, County and State.

That said business was operated pursuant to a City of Pasadena Ordinance which required, prior to doing or conducting said business, that said business procure a public liability and property damage insurance policy with the policy being the same policy as Exhibit "A" of plaintiff's amended complaint; that said policy was applied for because of the Ordinance and was issued pursuant to the Ordinance and the said Ordinance was a part of the terms, covenants and agreements of said policy. That said policy was filed with the City of Pasadena and thereafter the City of Pasadena issued a written permit to Blodgett or said estate to conduct said you-drive rental business.

That about April 7, 1946, said business rented the Packard automobile described in plaintiff's amended complaint in the City of Pasadena, County of Los Angeles, State of California, to Sam Richardson for his use of said vehicle for an initial term expiring April 14, 1946, and that said rental to the said Richardson for said term of said automobile was with the consent of said business or Roy R. Jordon as executor of the estate owning said business.

That plaintiff herein, subsequent to April 9, 1946, instituted suits in the Superior Court of the State of California in and for the County of Los Angeles against Sam G. Richardson, also known as Sam Richardson for personal injuries and property

damage resulting from a collision accident occurring April 9, 1946, and thereafter [53] said Superior Court entered judgment in favor of plaintiff and against Sam Richardson, also known as Sam G. Richardson, in the form of personal injuries in the amount of Twenty-Five Thousand Dollars ($25,000.00) and for property damage in the sum of Six Thousand Dollars ($6,000.00) on the 17th day of September, 1946, together with interest at 7% thereon until paid, together with plaintiff's costs in the sum of Fourteen Dollars ($14.00). That said judgment has become and is now final.

That prior to bringing this suit plaintiff has caused a demand to be made upon this defendant and that said defendant has not paid this plaintiff any sum on said judgment.

That prior to April 9, 1946, defendant, Royal Indemnity Company, a corporation, and Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or Blodgett's Auto Service or Blodgett's Auto Service and Tours made a third party beneficiary contract in writing, which contract is the insurance policy annexed as Exhibit "A" in plaintiff's amended complaint, and that said contract was for the benefit and protection of any person on account of any loss by reason of liability imposed by law upon any of Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett,

or Blodgett's Auto Service or Blodgett's Auto Service and Tours because of bodily injury or destruction of property sustained by such person as the result of the use of any automobile scheduled in said policy. That the Packard automobile described in plaintiff's amended complaint was one of the automobiles covered by said policy as of April 9, 1946, and that said automobile was an asset of and owned by Blodgett's Auto Service, Blodgett's Auto Service and Tours and the Estate of Harry E. Blodgett, Deceased. [54]

That as of April 9, 1946, the said policy or contract was in full force and effect.

Dated this 15th day of February, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [55]

[Title of District Court and Cause.]

AFFIDAVIT OF J. D. BRADY

State of California,
County of Los Angeles—ss.

J. D. Brady, being duly sworn, deposes and says:

That affiant is a lieutenant in the sheriff's office of Los Angeles County, State of California, and is assigned to the Civil Division; that in his office are kept the official records of service of process.

That said records show that in case No. 516890 of the Superior Court of the State of California, in and for the County of Los Angeles, entitled George

N. Olmstead vs. Sam G. Richardson, et al., that a deputy of the sheriff's office by the name of Roy Carter served summons and complaint in said action on Sam G. Richardson at 1:00 p.m. on August 3, 1946, at 804 South San Gabriel Boulevard, San Gabriel, California.

That a service ticket, being a part of said records, has a notation thereon in the handwriting of said Roy Carter which [56] states "Sam G. Richardson is 5 feet 7 or 8 inches, 150-160 pounds, black wavy hair, small mustache, he asked what it was all about and I showed him complaint and he then remarked 'Oh, that was something that happened three or four months ago.' "

/s/ J. D. BRADY.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ JOHN E. SISSON,
Notary Public in and for
Said County and State. [57]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE N. OLMSTEAD

State of California,
County of Los Angeles—ss.

George N. Olmstead, being duly sworn, deposes and says as follows:

That affiant is the plaintiff in the above-entitled cause, and is the same George N. Olmstead who was

and is plaintiff in that certain suit in the Superior Court of the State of California, in and for the County of Los Angeles, against Sam Richardson, also known as Sam G. Richardson, et al., being case numbers 516890 and 515192.

That affiant has not been paid nor received any sum or any amount or thing or things of value from Sam Richardson, also known as Sam G. Richardson, on affiant's judgment against the said Richardson. That the whole of said judgment and all thereof remains due and owing to affiant and is wholly unsatisfied.

/s/ GEORGE N. OLMSTEAD.

Subscribed and sworn to before me this 13th day of February, 1950.

[Seal] /s/ JOHN E. SISSON,
Notary Public and for
Said County and State. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF WALTER N. HATCH IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Walter N. Hatch, being duly sworn, deposes and says as follows:

That on, prior to and following April 9, 1946, affiant was a sergeant of and with the Police De-

partment of the City of San Gabriel, and that during the late evening hours and the early morning hours of the day of April 9, 1946, when George N. Olmstead was injured, affiant was on duty as a radio patrolman engaged in patrol work for said Police Department for said city, and that at about 2:50 o'clock a.m. affiant, while riding in said police car, affiant was dispatched to a location on South San Gabriel Boulevard, North of Valley Boulevard, at or about the 1200 block of South San Gabriel Boulevard; affiant immediately proceeded to said designated point and there found an injured male lying upon the surface of said street; affiant immediately commenced and thereafter continued and completed an official [59] investigation of the circumstances surrounding the injury to said male so found; that affiant ascertained that the identification documents upon the said male were in the name of George N. Olmstead and affiant thereafter personally ascertained that said male was George N. Olmstead, and affiant procured the attendance of Alford P. Olmstead who represented to affiant that he was an attorney licensed in the State of California and that he was the brother of the injured male and who said that the injured male was George N. Olmstead.

Further, that affiant ascertained of his own knowledge that Samuel G. Richardson, also known as Sam Richardson, was at the location where affiant found the injured male identified as George N. Olmstead; that affiant theretofore, had personally known the said Richardson as a San Gabriel city resident, at 836 South San Gabriel Boulevard, for a substantial

period prior to said date. That affiant immediately on arrival inquired as to the identification of the driver of the vehicle which had collided with the said injured male identified as George N. Olmstead and the said Richardson, almost immediately upon affiant's arrival at said location, stated to affiant that he, the said Richardson, was the driver of the Packard automobile involved in the collision with the injured male, George N. Olmstead, at a point of impact on the traveled surface of said San Gabriel Boulevard. Further, that said Richardson then stated to affiant that the vehicle driven by him was a rented vehicle, and affiant then ascertained that the registered owner of said vehicle was Blodgett's Rental Service, Hotel Green, Pasadena, Calif.; that said vehicle was a 1940 Packard sedan with California license No. 10 L 343.

That subsequent to said 9th of April, 1946, affiant thereafter had several conversations with the said Richardson over a period of the next 8 or 9 weeks and on those occasions the said Richardson again stated to affiant that he, the said [60] Richardson, had been the driver of the vehicle involved in a collision with a pedestrian identified as George N. Olmstead. That said Richardson continued to reside in and be about his usual residence at 836 San Gabriel Boulevard, San Gabriel, and operating a service Station at Grand and San Gabriel Blvd., for a period of about 8 or 9 weeks after April 9, 1946.

That affiant talked with said Richardson on these several occasions, in the course of making affiant's official investigation for and on behalf of the said Police Department.

That the matters hereinabove alleged and all of them are within the personal knowledge of affiant, and that affiant could and would so testify if called to court as to these matters hereinabove stated.

/s/ WALTER N. HATCH.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ JOHN E. SISSON,
Notary Public in and for
Said County and State.

[Endorsed]: Filed February 15, 1950. [61]

[Title of District Court and Cause.]

PLAINTIFF'S INTERROGATORIES

Now comes the plaintiff and serves the following interrogatories upon the defendant, Royal Indemnity Company, a corporation, pursuant to Rule 33 of the Federal Rules as amended:

1. Was or is Royal Indemnity Company, a corporation, or any of its subsidiary insurance companies, or its parent companies, or its sister insurance companies, a party to any liability policy of insurance with Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours," which said policy pertains to any excess liability or re-insurance liability over and apart

from the policy annexed as Exhibit "A" in plaintiff's amended complaint, and pertaining to bodily injury or property damage as the result of negligence in the operation, maintenance, use or ownership of the rental vehicles scheduled in Exhibit "A" to plaintiff's amended complaint with said policy or [75] policies dated prior to April 9, 1946, and by their terms extending for some period subsequent to April 9, 1946?

2. Is there on file with the police department of the City of San Gabriel, the Sheriff's Office of the County of Los Angeles at its records office in the Hall of Justice, Los Angeles, California, and at its substation in Temple City, County of Los Angeles, State of California, or at the office of the State of California Highway Patrol at its office in Pomona, California, written original reports by some or all of said agencies concerning the collision of April 9, 1946, described in plaintiff's amended complaint, which said reports and all of them show that only Sam Richardson, also known as Sam G. Richardson, was the driver and in possession of and operating the certain Packard automobile on April 9, 1946, and on South San Gabriel Boulevard at the time of its impacting plaintiff; and that Sam Richardson, also known as Sam G. Richardson, so represented himself immediately after the accident, to said investigating officers that he was the driver and in possession of said Packard automobile at said time and place?

3. Since what dates have said reports been filed?

4. Did Sam Richardson, also known as Sam G. Richardson, sign for the sheriff of the County of Los Angeles and the California Highway Patrol, a written original report pertaining to an injury to a person resulting from a collision with a Packard vehicle which he was driving, which collision occurred on April 9, 1946, on South San Gabriel Boulevard which report records at said time his Packard automobile as described in plaintiff's amended complaint was the vehicle involved?

5. On what date did defendant, Royal Indemnity Company, a corporation, first know of the contents of said reports as referred to in numbers 2, 3 or 4?

6. In what respect or to what extent was the Packard automobile not being driven, operated or used on April 9, 1946, [76] on South San Gabriel Boulevard, at the time of the collision referred to in plaintiff's amended complaint, with the permission and consent of Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours"?

7. Did plaintiff sustain bodily injuries and thereafter expend money and incur obligations for medical care and treatment as a result of said collision occurring on April 9, 1946, on South San Gabriel Boulevard in the County of Los Angeles?

8. Was the Packard automobile described in plaintiff's amended complaint the vehicle involved

in said collision referred to in the interrogatory numbered 7?

9. Was Sam Richardson, also known as Sam G. Richardson, the driver of said Packard automobile at said time and place as referred to in plaintiff's two interrogatories numbered 7 and 8?

10. Do the said investigation reports by the police, sheriff's office and California Highway Patrol show the residence of the driver of the Packard automobile involved in the aforesaid collision, to wit, Sam G. Richardson, to be 836 South San Gabriel Boulevard, San Gabriel, California?

11. Did Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" recover the said Packard automobile from the vicinity of 836 South San Gabriel Boulevard after April 9, 1946?

12. What did Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours," require Sam Richardson, also known as Sam G. Richardson, [77] to present or do on or about April 7, 1946, prior to renting said Packard sedan to the said Richardson?

13. What records did Harry E. Blodgett or Roy

R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" make recording the nature and contents of any documents, certificates, licenses or like proof exhibited by the said Richardson prior to renting said vehicle to the said Richardson as referred to in plaintiff's interrogatory numbered 12?

14. Did Roy Jordon on or prior to April 9, 1946, write or place insurance for defendant Royal Indemnity Company, a corporation, and maintain an insurance office in the City of Pasadena, State of California?

15. What was the date prior to June 27, 1946, and subsequent to April 9, 1946, that Roy Jordon or his representatives communicated with or reported to defendant, Royal Indemnity Company, a corporation, notice that the aforesaid Packard vehicle driven by Sam Richardson, also known as Sam G. Richardson, had been involved in a collision on South San Gabriel Boulevard on April 9, 1946?

16. Did Royal Indemnity Company, a corporation, on behalf of Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" commence to investigate the circumstances surrounding and talk to witnesses about the April 9, 1946, collision at least in June, 1946, and continuing thereafter?

17. Did Roy Jordon or his representatives at the same time as the date of Royal Indemnity Company's answer to plaintiff's interrogatory numbered 15, communicate or report to defendant that the said Packard vehicle driven by Sam Richardson, also known [78] as Sam G. Richardson, had collided on April 9, 1946, with a pedestrian on South San Gabriel Boulevard, a public right of way?

18. Did Roy Jordon or his representatives at the same time as the date of defendant Royal Indemnity Company's answer to plaintiff's interrogatory numbered 15, communicate with or report to defendant Royal Indemnity Company, a corporation, that said pedestrian was or claimed to be seriously injured physically?

19. When did defendant, Royal Indemnity Company, a corporation, receive a copy of the summons and complaint in Case No. 515192, in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "George N. Olmstead, et al., v. Sam G. Richardson, Harry E. Blodgett, et al.," from Roy Jordon individually or as executor of the Estate of Harry E. Blodgett, Deceased?

20. What conversations or communications did representatives of defendant Royal Indemnity Company, a corporation, have with Sam Richardson, also known as Sam G. Richardson, subsequent to April 9, 1946, and prior to April 17, 1947?

21. When did defendant, Royal Indemnity Company, a corporation, request any assistance, personal

attendance or cooperation of or from Sam Richardson, also known as Sam G. Richardson, in connection with said collision and how was said request communicated and what was requested?

22. What could Sam Richardson, also known as Sam G. Richardson, have truthfully testified to at time of trial in Superior Court in case No. 516890 or done in attending the said trial other than tending to establish his and the defendant Royal Indemnity Company's liability to plaintiff?

23. What cooperation, assistance, attendance or evidence pertaining to said collision in connection with case No. 516890 did defendant, Royal Indemnity Company, a corporation, request of Sam Richardson, also known as Sam G. Richardson, and when was [79] such request made?

24. Did Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours," subsequent to April 9, 1946, fail in any respect to notify, attend, assist or cooperate with defendant, Royal Indemnity Company, a corporation, regarding defending Superior Court suits No. 515192 or 516890?

25. Did defendant, Royal Indemnity Company, a corporation, subsequent to April 9, 1946, and prior to April 17, 1947, decline or refuse to defend Sam Richardson, also known as Sam G. Richardson, in

either or both Superior Court actions hereinabove referred to?

26. What probative facts occurred subsequent to April 9, 1946, to prejudice in any wise defendant, Royal Indemnity Company, a corporation, in connection with defending either of the two Superior Court suits hereinabove referred to or on its liability on its policy annexed as Exhibit "A" in plaintiff's amended complaint?

27. How many full time investigators, adjustors or representatives regarding Court actions did Royal Indemnity Company, a corporation, employ in its Los Angeles County operations during the period April 9, 1946, to September 12, 1946?

28. Was examination of accident investigation notes, memoranda or reports compiled by the police department, sheriff's office or California Highway Patrol regarding the aforesaid collision continuously from April 9, 1946, to the present time, available to defendant, Royal Indemnity Company, a corporation?

29. Did defendant, Royal Indemnity Company, a corporation, have exclusive control of defending or the opportunity to defend Superior Court Actions 515192 and 516890 entitled "George N. Olmstead vs. Sam G. Richardson, H. E. Blodgett, Roy Jordon as [80] Executor of the Estate of Harry E. Blodgett, Deceased, et al," from June, 1946, and thereafter?

30. What, if anything, did defendant, Royal

Indemnity Company, a corporation, tender, make or attempt to make concerning any defense of Sam Richardson, also known as Sam G. Richardson, at any time, in the two Superior Court suits described in plaintiff's interrogatory numbered 29?

31. Has Royal Indemnity Company, a corporation, paid plaintiff or his representatives any portion of plaintiff's judgment against Sam Richardson, also known as Sam G. Richardson?

32. What conditions or requirements contained in the policy annexed as Exhibit "A" of plaintiff's amended complaint have not, as to this plaintiff, been complied with or performed?

33. What did defendant, Royal Indemnity Company, a corporation, or its local representatives know as of February 16, 1946, and prior to April 9, 1946, of automobiles being rented by Harry E. Blodgett or Roy R. Jordon as Executor of the Estate of Harry E. Blodgett, Deceased, or as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, or "Blodgett's Auto Service" or "Blodgett's Auto Service and Tours" and, after rental in the City of Pasadena, being frequently and commonly driven and operated by renters and drivers throughout Southern California and outside of the City of Pasadena?

34. At any time, did defendant Royal Indemnity Company, a corporation, make any attempt to intervene, appear for or make any formal motions for or on behalf of Sam Richardson, also known as

Sam G. Richardson, in Superior Court case number 516890?

Plaintiff, pursuant to Rule 33 of the Federal Rules as amended, requires that defendant, Royal Indemnity Company, a corporation, fully answer each of the foregoing interrogatories within fifteen (15) days after service hereof upon it or [81] its attorney.

Dated this 10th day of March, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 13, 1950. [82]

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S INTERROGATORIES

Comes now the defendant and for answer to plaintiff's interrogatories, admits, denies and alleges as follows:

1. The only policy of insurance between the parties mentioned in Interrogatory Number 1 and this defendant, is that policy annexed as Exhibit "A" to plaintiff's amended complaint.

2. This defendant is not in possession of any of the said reports, and has no information or belief upon which to answer the interrogatories relating to the said reports.

3-4. This defendant has no information or belief upon which to answer these interrogatories.

5. This defendant has never known the exact contents of the said reports.

6. This defendant is unable to answer this interrogatory since it has no information or belief as to whether the said [84] vehicle was being driven, operated, or used pursuant to that certain rental agreement referred to by plaintiff.

7-8-9-10-11-12-13. This defendant does not have sufficient information or belief upon which to answer these interrogatories.

14. Yes.

15. On or about June 12, 1946, Roy Jordon forwarded to this defendant a copy of the complaint served upon him in Superior Court case Number 515192 and the only notice or knowledge received from Roy Jordan as to the alleged collision was contained in the said complaint.

16. Yes, the said investigation was commenced a few days after the receipt of the complaint referred to in the answer to Interrogatory Number 15 above.

17. See the answer to Interrogatory Number 15.

18. No.

19. See the answer to Interrogatory Number 15.

20-21. On or about December 19, 1946, an investigator of this defendant orally requested the same

Sam G. Richardson to inform him as to the facts surrounding the alleged collision.

22. This defendant has no information or belief as to what the said Sam G. Richardson could have truthfully testified to at the time of trial; however, this defendant does not believe that he would have testified to any fact tending to establish his liability to plaintiff.

23. See the answers to Interrogatories 20 and 21.

24. No.

25. No, this defendant was never requested to defend Richardson in any legal action, nor was it informed that the said Richardson had ever been served in any action.

26. A default judgment was taken against the said Richardson without knowledge on the part of this defendant. [85] Further, this defendant had not been notified that Richardson had ever been served, and had never received any request on the part of the said Richardson to furnish any defense for him.

27. About seven.

28. This defendant has no information or belief upon which to answer this interrogatory.

29. No.

30. None.

31. This defendant has paid $3,500.00 on the part of Roy Jordan, executor of the estate of Harry Blodgett.

32. This defendant has no information or belief upon which to answer this interrogatory.

33. Nothing.

34. No.

TRIPP & CALLAWAY,

By /s/ F. V. LOPARDO,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1950. [86]

[Title of District Court and Cause.]

ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Comes now the defendant Royal Indemnity Company, and for reply to plaintiff's request for admissions, admits, denies and alleges as follows:

Answer to Request No. 1: Defendant admits that the said Packard was in the possession of Sam Richardson on the date alleged.

Answer to Request No. 2: Defendant admits that Sam G. Richardson drove, operated and used the said vehicle on the alleged date.

Answer to Request No. 3: Defendant specifically denies that the said Sam G. Richardson had the permission or consent of Roy R. Jordan to drive or operate or use the said vehicle at the time and place of said accident.

Answer to Request No. 4: Defendant refers to its answers to request number 3 above and by its reference thereto incorporates [87-A] herein the said answer as though fully set forth herein.

Answer to Request No. 5: Defendant admits that the said vehicle was involved in an accident with the plaintiff on or about the time alleged.

Answer to Request No. 6: Defendant admits that the said accident and the injuries purportedly resulting therefrom were the basis of plaintiff's cause of action.

Answer to Request No. 7: Defendant admits that there was a collision between plaintiff and Sam G. Richardson at or about the time and place alleged but specifically denies the remaining allegations referred to in the said request.

Answer to Request No. 8: Defendant admits that there was a collision between plaintiff and Sam G. Richardson at or about the time and place alleged but specifically denies the remaining allegations referred to in the said request.

Answer to Request No. 9: Defendant admits that the said rental memorandum shows the residence of Sam Richardson to be 836 South San Gabriel, San Gabriel, California, as of April 7, 1946.

Answer to Request No. 10: Defendant cannot truthfully admit or deny the contents of the records of the Sheriff of Los Angeles County in regard to service of summons upon the said Sam Richardson

for the reason that it has never inspected any such records, but in this connection defendant specifically denies that the said Sam Richardson was ever personally served with summons or complaint as alleged by plaintiff, or otherwise legally served with such summons and complaint.

Answer to Request No. 11: Defendant admits that in Superior Court suit number 515192 plaintiff alleged in substance or effect "That Sam G. Richardson was using and operating said automobile at the time and place mentioned herein with the permission, consent and acquiescence of the said defendant, Harry E. Blodgett." Defendant admits that it omitted to plead to the paragraph [87-B] containing these allegations through inadvertence and in this connection defendant specifically denies the said allegations.

Answer to Request No. 12: Defendant admits that on or about the said date it agreed in open court to a stipulated judgment against the estate of Harry E. Blodgett and thereafter paid to plaintiff the sum of $3,500.00 and received a full satisfaction of judgment therefor.

Answer to Request No. 13: Defendant admits that it received full payment of the premium charged for the insurance contract attached to plaintiff's amended complaint as Exhibit "A."

Answer to Request No. 14: Defendant admits that the said Roy Jordan cooperated with it to the best of his ability, but in this connection defendant alleges that the first and only notice of accident

received from the said Jordan consisted of a notification of the contents of the summons and complaint in the alleged action which were served upon said Jordan.

Answer to Request No. 15: Defendant admits that the vehicle described in plaintiff's amended complaint was rented by the Blodgett Auto Service on or about the date alleged, in the City of Pasadena, to Sam Richardson for an initial term expiring April 14, 1946.

Answer to Request No. 16: Defendant admits the matter contained in this request.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 7, 1950. [87-C]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE AMENDMENT TO ANSWER

Comes Now the defendant, Royal Indemnity Company, a corporation, and moves the court for leave to file an amendment to its answer heretofore filed on February 3, 1950, to the amended complaint; and for reason therefor states:

That on April 10, 1950, it was discovered for the

first time that Sam G. Richardson had never been served with summons or complaint in the case of George N. Olmstead, etc., vs. Sam G. Richardson, et al., Los Angeles Superior Court number 516890;

That this amendment is necessary and material to the defense of the above-entitled action by this defendant.

That this motion will be based on the record of the above-entitled case, all pleadings and papers filed therein and hereafter, and on the affidavits of Hulen C. Callaway, Sam G. Richardson, Elizabeth E. Richardson, George Hosey, Robert E. Dunne and R. W. Clayton. [88]

To Plaintiff and C. Paul DuBois His Attorney:

Please Take Notice That the undersigned will bring the above motion on for hearing before this Court at the courtroom of the Honorable James M. Carter, in the United States Courthouse in the City of Los Angeles on May 15, 1950, at 10:00 a.m., or as soon thereafter as counsel may be heard.

TRIPP & CALLLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Points and Authorities

A party may amend his pleadings at any time with leave of court. This amendment may be made upon motion even after judgment.

Rule 15, F.R.C.P.
Downey v. Palmer,
27 Fed. Supp. 993

Di Trapani v. M. A. Henry Co.,
7 FRD 123

Receipt of Copy acknowledged.

[Endorsed]: Filed May 5, 1950. [89]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Comes Now the defendant Royal Indemnity Company, a corporation, after leave of court first had and obtained, and files this, its Amendment to Answer to Amended Complaint on file herein by adding to the said Answer the following affirmative defense:

"For a Further, Separate and Distinct Affirmative Defense to Both Causes of Action, Defendant Alleges:

I.

That the said judgment rendered against Sam G. Richardson in the case of George N. Olmstead, by Alford P. Olmstead, his Guardian ad Litem vs. Sam G. Richardson, Roy Jordan, Individually, as Executor of the Estate of Harry E. Blodgett, Deceased, etc., et al., Los Angeles Superior Court number 516890, was and is void for the reason that the said Superior Court of the State of California in and for the County of Los Angeles never acquired jurisdiction [91] over the said Sam G. Richardson in that the said Sam G. Richardson was never at

any time personally or properly served with summons or complaint in the aforesaid action."

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

Lodged May 5, 1950. [92]

[Title of District Court and Cause.]

ORDER

A motion having regularly been made by the plaintiff above named, and the above-named cause coming on this 3rd day of April, 1950, to be heard on said motion of plaintiff for an order to strike:

(a) Page 2, line 15-23, inclusive—"but in this connection defendant alleges that the said Sam G. Richardson did not notify defendant or the named assureds that he had ever been served with summons and complaint in said action; further, that defendant is informed and believes and thereupon alleges that the said Sam G. Richardson did not appear in court prior to the entry of his default or at the hearing of said action for the assessment of damages and that no testimony was introduced on behalf of the said Sam G. Richardson and that judgment was entered in said action against him by default." [94]

(b) Page 3, lines 20-32; Page 4, lines 1-8—"Answering paragraph II plaintiff alleges that it was provided in said insurance contract that as one

of the conditions of this defendant assuming the risks referred to in said contract, it was the duty of the insureds to at all times render to the defendant all cooperation and assistance in the securing of information and evidence and the attendance of witnesses and in the conduct of suits; and alleges that the said Sam G. Richardson, failed, neglected and refused to cooperate with this defendant in the securing of information and attendance of witnesses, failed to render to the defendant at any time, or at all, any cooperation or assistance, and in fact failed to ever contact or notify defendant regarding the purported collision or of the subsequent purported service upon him of any summons and complaint in Superior Court action number 516890, and failed to deliver same to defendant or to request defendant to defend said action; that the said Sam G. Richardson failed and neglected to notify this defendant of the date of trial and failed and neglected to appear at the trial of said action as a witness and defendant was not aware that said Sam G. Richardson had been served with summons and complaint in said action and was not requested to defend the said action on behalf of said Sam Richardson referred to in plaintiff's complaint."

(c) Page 4, lines 18-32; Page 5, lines 1-16—"That the policy of insurance referred to in plaintiff's amended complaint provided that the insurance protection therein provided for was subject to certain special conditions, which said special conditions are as set out in plaintiff's Exhibit "A" and hereby made a part hereof, and among other things, pro-

vides that the insureds shall at all times render to this defendant all cooperation and assistance and to aid this defendant in securing information and evidence and the attendance of witnesses in the conduct of suits arising out of the use of the automobiles referred to in said policy of insurance; [95] that the said Sam G. Richardson never at any time, prior to the entering of a default judgment against him, reported the happenings of the purported accident referred to in plaintiff's amended complaint to this defendant or to the named assureds; that the said Sam G. Richardson failed, neglected and refused to notify this defendant or the named assureds that he was ever served with summons and complaint in said Superior Court action number 516890 and failed, neglected and refused to notify or in any way inform this defendant or the named assureds of the date of trial, and in fact, this defendant or the named assureds had no knowledge of said purported service of summons and complaint or said default or the setting of hearing to prove up damages until a time subsequent to the entry of judgment against said Sam G. Richardson; that the said Sam G. Richardson failed, neglected and refused to cooperate with this defendant or with the named assureds in the obtaining of any information and obtaining witnesses to said purported accident, and failed, neglected and refused to cooperate or assist this defendant or the named assureds in the conduct of suits or in obtaining the attendance of witnesses and failed and neglected to appear and testify at the trial of said action, although able so to do,

all to the substantial prejudice of this defendant." As portions of the answer of Royal Indemnity Company, a corporation, to plaintiff's amended complaint, and counsel being heard for the respective parties and due deliberation having been had, and on reading and filing the affidavits of J. D. Brady verified February 14, 1950, George N. Olmstead verified February 13, 1950, and Walter N. Hatch verified February 14, 1950, it is hereby ordered that plaintiff's motion to strike be and the same hereby is sustained and granted and that said portions of said answer hereinabove set out and all thereof be stricken from the record herein.

/s/ JAMES M. CARTER,
Judge.

Enter.

Dated: 4/27/50.

Approved as to Form.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1950. [96]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Proposed by Plaintiff, as adopted by the Court.)

The above-entitled cause came on regularly for disposition on plaintiff's motion to strike and plaintiff's motion for summary judgment before the Honorable James M. Carter, District Judge of the above-entitled court, and said motions were orally

argued, on the third day of April, 1950; that plaintiff appeared by his attorney, C. Paul DuBois; that defendant, Royal Indemnity Company, a corporation, appeared by its attorneys, Tripp & Callaway by F. V. Lopardo.

That after hearing the arguments and examining the pleadings, motions, and affidavits in support of the motions with no counter-affidavits offered or submitted by said defendant in opposition to said motions, memoranda of points and authorities having been heretofore filed in support of and in opposition to said motion, and the court having considered said defendant's [98] answers to plaintff's interrogatories and said defendant's answers to plaintiff's request for admissions and the matter having been submitted to the court for its decision, and the court being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

That it is true that defendant, Royal Indemnity Company, a New York corporation, did enter into a written agreement effective February 16, 1946, in tenor and in form as contained in Exhibit A of plaintiff's amended complaint. That said agreement was in full force and effect on April 9, 1946.

II.

That it is true that the City of Pasadena, a municipal corporation, had theretofore adopted an

ordinance, being Ordinance No. 3041 as amended to November 1, 1945, which said ordinance was entitled "An Ordinance of the City of Pasadena Regulating the Operation of Certain Motor Propelled Vehicles, Drive-Yourself Vehicles, Vehicles Transporting Passengers for Compensation or for Sight-Seeing Purposes Upon the Public Streets and Prescribing Penalties for the Violations Thereof."

III.

That it is true that said ordinance was in effect on February 16, 1946, April 7, 1946, and on April 9, 1946.

IV.

That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation [99] or use thereof by any person responsible for such operation.

V.

That it is true that the State of California had, prior to November 1, 1945, by Vehicle Code Section 459, adopted a statute which had not, as of April 9, 1946, been repealed or modified, providing that local authorities within the reasonable exercise of the police power may adopt rules and regulations

by ordinance on the licensing and regulating of the operation of vehicles for hire.

VI.

That it is true that Harry E. Blodgett or the Estate of Harry E. Blodgett, deceased, or H. E. Blodgett doing business as Blodgett's Auto Service and Tours, Blodgett's Auto Service and Tours, Roy R. Jordan as executor of the estate of Harry E. Blodgett, deceased, Roy R. Jordan as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, were on April 7, 1946, and on April 9, 1946, the named insureds within the terms of said Exhibit A.

VII.

That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena.

VIII.

That it is true that the original agreement, of which Exhibit A is a copy, is typewritten as to the portions thereof set out at Page 10, lines 29 through 32, inclusive; page 11, lines 1 through 20, inclusive, of said Exhibit A; and that the original agreement as to the contents set out at page 2, lines 20 through 32, inclusive; page 3, lines 1 through 34, inclusive; page 4, lines 1 through 32, inclusive; page 5, lines 1 through 33, inclusive; page 6, lines 1 through 17, inclusive; page 13, lines 1 through 33, inclusive; page 14, lines 1 through 33, inclusive; page

15, lines 1 [100] through 32, inclusive; page 16, lines 1 through 14, inclusive; page 19, lines 1 through 32, inclusive; page 20, lines 1 through 32, inclusive; page 21, lines 1 through 5, inclusive, are all printed words, phrases, sentences and paragraphs contained in said policy undertaking.

IX.

That it is true that on April 9, 1946, the described Packard automobile was in the posesssion of Sam Richardson, also known as Sam G. Richardson.

X.

That it is true that on April 7, 1946, the above-named insureds had consented to and permitted the additional insured, Sam Richardson, to drive and had rented and delivered possession of said Packard automobile for an initial term expiring April 14, 1946, for purposes of his using said vehicle.

XI.

That it is true that said delivery of possession and rental was made in the City of Pasadena, County of Los Angeles, State of California.

XII.

That it is true that in connection with said delivery of possession, rental and consent to operation, Sam Richardson gave to said named insureds his residence address as being 836 South San Gabriel, San Gabriel, California.

XIII.

That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard.

XIV.

That it is true that the southerly boundaries of the [101] City of Pasadena terminate at about 620 South San Gabriel Boulevard.

XV.

That it is true that said collision accident occurred outside of the physical boundaries of the City of Pasadena, a municipal corporation.

XVI.

That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage.

XVII.

That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California

in and for the County of Los Angeles, wherein plaintiff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of $25,000.00 and on account of property damage in the sum of $6,000.00 on the 12th day of September, 1946.

XVIII.

That it is true that defendant, Royal Indemnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and circumstances thereof, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Richardson and the named insureds as the result of negligence on the part of Sam Richardson in his operation of said Packard vehicle during the rental period for which the named insureds had consented to his use and given possession of said Packard vehicle. [102]

XIX.

That it is true that Royal Indemnity Company, a New York corporation, received full payment of its premium charge against the named insureds on all rental charges for the rental of said Packard automobile at said time.

XX.

That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known as Sam G. Richardson, was and is unpaid, and that interest

at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of $14.00.

XXI.

That it is true that a few days after June 12, 1946, defendant, Royal Indemnity Company, a New York corporation, commenced to investigate the circumstances surrounding and talked to witnesses about the collision accident hereinabove referred to, and continued in the same thereafter to and at least as late as December 19, 1946.

XXII.

That it is true that during the period from June 12, 1946, to December 19, 1946, defendant, Royal Indemnity Company, a New York corporation, only orally requested information from Sam Richardson, its additional insured, in connection with said collision accident.

XXIII.

That it is true that the estate of Harry E. Blodgett, deceased, and Roy R. Jordan as executor of the estate of Harry E. Blodgett, deceased, and as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, and Blodgett's Auto Service, and Blodgett's Auto Service and Tours, did, subsequent to April 9, 1946, cooperate in all respects with defendant, Royal [103] Indemnity Company, in notifying said defendant and

forwarding of suit papers, attending hearings or conferences and in defending against plaintiff's Superior Court civil suits for damages for personal injuries and property damage.

XXIV.

That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson.

XXV.

That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits.

XXVI.

That it is true that defendant, Royal Indemnity Company, a New York corporation, did not tender, make or attempt to make any defense of its additional insured, Sam Richardson, in plaintiff's civil damage actions in the Superior Court.

XXVII.

That it is true that defendant, Royal Indemnity Company, a New York corporation, did not make

any attempt to intervene, appear for, or make any motions in said Superior Court civil damage actions for or on behalf of this defendant's additional insured, Sam Richardson.

XXVIII.

That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of [104] June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiesence of the named insured.

XXIX.

Ordered stricken 6-26-50.

XXX.

That it is true that defendant, Royal Indemnity Company, a New York corporation, in preparing its insurance policy as embodied in Exhibit A of plaintiff's amended complaint has omitted and refrained from including any word, phrase, sentence or language in any wise restricting the effect of its undertaking to the area within the boundaries of the City of Pasadena.

XXXI.

That it is true that defendant, Royal Indemnity Company, a New York corporation, and its named insureds filed prior to April 7, 1946, the original policy of which Exhibit A of plaintiff's amended complaint is a copy, with the City of Pasadena.

XXXII.

That it is common knowledge that automobiles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena.

XXXIII.

That defendant, Royal Indemnity Company's pleadings and papers in opposition to plaintiff's motion raise no genuine issue of fact as to any material matter.

Conclusions of Law

I.

That Sam Richardson, also known as Sam G. Richardson, [105] was on April 7, 1946, and on April 9, 1946, an additional insured within the terms of Exhibit A.

II.

That the scope of defendant Royal Indemnity Company's undertaking, as excerpted in Exhibit A of plaintiff's amended complaint, is co-extensive with the area of operation of, and of the liability

of the named insured for damages resulting from the negligent operation of any such insured responsible for the operation of such vehicle.

III.

That plaintiff is entitled to judgment against defendant, Royal Indemnity Company, a New York corporation, in the sum of $20,000.00 together with interest at the rate of 7% from September 12, 1946, to date of entry of judgment herein, together with plaintiff's allowed costs of suit in the sum of $14.00 in the civil action for damages in the Superior Court.

IV.

That plaintiff is entitled to his costs and disbursements incurred or expended herein.

Judgment is hereby ordered to be entered accordingly.

Dated: 4/27/50.

/s/ JAMES M. CARTER.

The foregoing is approved as to form.

..... [106]

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1950. [107]

District Court of the United States, Southern District of California, Central Division

No. 8729 C

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation; DOE COMPANY, a Corporation; ROE COMPANY, a Corporation,

Defendants.

JUDGMENT

A motion having regularly been made by the plaintiff above named, and the above cause coming on to be heard on said motion of plaintiff for summary judgment upon his amended complaint for the relief demanded in said amended complaint under Rule 56 of the Federal Rules of Civil Procedure that there is no genuine issue as to any material fact, the affidavits in support thereof, the answers to plaintiff's request for admissions, the answers to plaintiff's interrogatories, with due proof of service of said notice of motion and affidavits in support of the said motion, and after argument had in open court, it is,

Ordered, Adjudged and Decreed that said motion for summary judgment be and the same is granted; that plaintiff do have and recover from the defendant, Royal Indemnity Company, a corporation, the sum of $20,014.00 with interest thereon at 7%

per annum from [108] the 12th day of September, 1946, to the date hereof, in the sum of $5,075.04, making a total sum of $25,089.04, and costs of ..... this action to be taxed by the clerk against defendant, Royal Indemnity Company, a corporation, for which plaintiff shall have execution.

/s/ JAMES M. CARTER.

Enter: 4/27/50.

Approved as to form.

.....

Judgment entered Apr. 27, 1950.

Docketed Apr. 27, 1950, Book 65, Page 465.

Set aside by judgment filed and entered June 26, 1950, in judgment book 66, page 690.

EDMUND L. SMITH,
Clerk U. S. District Court.

By /s/ C. A. SIMMONS,
Deputy Clerk. [109]

Memorandum (Rule 7(h) Local Rules Southern District of California)

7% on $20,000.00 amounts to $1,400.00 per year or $116.67 per month, or $3.89 per day, or from September 12, 1946, to April 12, 1950, a period of three years seven months or $5,016.69 to April 12, 1950, and at the daily rate thereafter of $3.89 until the entry of this judgment.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 27, 1950. [110]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND TO SET ASIDE JUDGMENT AND BRIEF IN SUPPORT THEREOF

Comes Now the defendant Royal Indemnity Company, a corporation, by its attorney below named, and moves the Court to grant a rehearing on the Motion for Summary Judgment made by plaintiff in the above action and to set aside judgment and as grounds therefor states as follows:

1. Newly discovered evidence material for this defendant which it could not with reasonable and due diligence have discovered and produced at the hearing of the Motion for Summary Judgment.

2. The prior judgment rendered by the Superior Court of the State of California in and for the County of Los Angeles in action number 516890, and upon which the above-entitled action is based, is void and it is inequitable that the said judgment should have prospective application.

3. It was error for the Court to grant plaintiff's Motion [112] for Summary Judgment for the reason that:

(a) The record and all the pleadings and papers on file herein show that there are genuine issues as to several material facts.

(b) The plaintiff was not entitled to judgment as a matter of law.

4. It was error for the court to make the following findings of fact:

(a) "That it is true that said ordinance was by its terms declaratory of public policy that pedestrians or any other person who may be injured as a result of a you-drive business venture putting a dangerous instrumentality such as an automobile into the possession of an irresponsible driver, be protected against otherwise uncompensated damage resulting from negligent operation or use thereof by any person responsible for such operation." (Finding No. IV.)

This finding was error for the reason that the ordinance speaks for itself and it makes no reference to irresponsible drivers and furthermore there was no evidence whatsoever that the City of Pasadena enacted this ordinance for this reason, or for any reason other than that specified in the ordinance to wit: To regulate the operation of drive yourself vehicles upon the public streets of Pasadena.

(b) "That it is true that said agreement, Exhibit A, was a required and compulsory undertaking pursuant to said ordinance of the City of Pasadena." (Finding VII.)

This finding was error for the reason that there was no evidence introduced to show that the City of Pasadena intended to extend the effect of its ordinance beyond its city limits, or that it intended to protect citizens of other communities or that it had the right to project the effect of its ordinance beyond its limits into the jurisdiction of another governmental [113] unit.

(c) "That it is true that on April 9, 1946, said Packard automobile while being driven by the said Sam Richardson, with the permission and consent of the named insureds, was involved in a collision accident with plaintiff herein in the 1200 block, South San Gabriel Boulevard." (Finding XIII.)

This finding was error for the reason that there was no evidence of permission and/or consent given by the named insureds to the said Sam G. Richardson to drive or use the vehicle as it was being used on the evening in question. In fact, the answer and all other papers on file in this action show that defendant specifically denied that there was permission and/or consent.

(d) "That it is true that plaintiff in said collision accident at said time and place sustained bodily injuries and property damage." (Finding XVI.)

This finding was error for the reason that there was no evidence showing property damage and in fact the complaint filed by plaintiff in the Los Angeles Superior Court case number 516890, which is the basis of the above-entitled action, was for damages to person and was so captioned.

(e) "That it is true that the said Sam Richardson, receiving possession of said Packard automobile on April 7, 1946, under a rental agreement with the named insureds was the driver of said vehicle on April 9, 1946, at the time of the aforesaid collision accident with plaintiff, and was also the Sam Richardson who was named a defendant in a civil suit in Superior Court of the State of California

n and for the County of Los Angeles, wherein plain-iff herein took judgment against Sam Richardson on account of bodily personal injuries in the sum of $25,000.00 and on account of property damage n the sum of $6,000.00 on the 12th day of Sep-tember, 1946." (Finding XVII.) [114]

This finding was error for the reason that there was no evidence introduced to show that plaintiff was awarded any amount for damages to property.

(f) "That it is true that defendant, Royal In-demnity Company, a New York corporation, had on or about June 12, 1946, actual notice of said collision accident and of the time, place and cir-cumstances thereof, and that plaintiff herein then claimed personal injuries and property damage, and that plaintiff herein had filed a civil suit in negligence for damages against the said Sam Rich-ardson and the named insureds as the result of negligence on the part of Sam Richardson in his operation of said Packard vehicle during the rental period for which the named insureds had consented to his use and given possession of said Packard vehicle." (Finding XVIII.)

This finding was error for the reason that there was no evidence introduced showing, or tending to show, that this defendant had any notice other than that received from Roy Jordan which was based on the complaint served on him in the Los Angeles Superior Court case number 516890, attached hereto as Exhibit "X."

(g) "That it is true that plaintiff's judgment and all thereof against Sam Richardson, also known

as Sam G. Richardson, was and is unpaid, and that interest at 7% on said judgment from September 12, 1946, and all thereof, was and is unpaid, together with plaintiff's allowed costs of suit in said Superior Court action in the sum of $14.00." (Finding XX.)

This finding was in error for the reason that this defendant denied on information and belief such an allegation contained in paragraph XV of plaintiff's amended complaint, and furthermore the court had knowledge that plaintiff was paid $3500.00 in complete satisfaction of record in action number 516890 (See Request #12 of Plaintiff's Request for Admissions and answer #12 of Defendant's Answers to Request for Admissions). [115]

(h) "That it is true that subsequent to April 9, 1946, defendant, Royal Indemnity Company, a New York corporation, was not prejudiced in any wise in their defense of liability under Exhibit A except that a judgment for personal injuries and property damage was taken by plaintiff against this defendant's additional insured, Sam G. Richardson." (Finding XXIV.)

This finding was error for the same reason assigned to finding number XVII.

(i) "That it is true that defendant, Royal Indemnity Company, a New York corporation, having actual knowledge of the pendency of this plaintiff's claims, had the opportunity to defend its additional insured, Sam G. Richardson, in said damage suits." (Finding XXV.)

This finding was error for the reason that there

was no evidence introduced to this effect and the argument made by plaintiff is not evidence. Furthermore it would have been contrary to all legal and ethical practices for this defendant to enter a general appearance for Sam G. Richardson who had not requested defense or representation, since it would have exposed him to liability without his consent. In any event, the newly discovered evidence referred to herein conclusively shows that there was no service of summons or complaint upon the said Sam G. Richardson in the said case.

(j) "That it is true that defendant, Royal Indemnity Company, a New York corporation, in its defense of Harry E. Blodgett in connection with this plaintiff's Superior Court action for civil damages, in a verified answer for said named insured of June 27, 1946, admitted that the Packard vehicle was being used and operated by Sam G. Richardson at the time and place of the aforesaid collision accident with the permission, consent and acquiescence of the named insured." (Finding XXVIII.)

This finding was error for the reason that there was [116] no evidence introduced to this effect and this defendant has positively and unqualifiedly denied that there was such permission and/or consent.

(k) "That it is true that plaintiff's judgment against Sam G. Richardson in the prior civil action for damages in the Superior Court has not been satisfied in whole or in part." (Finding XXIX.)

This finding was error for the same reason assigned to finding number XX.

(l) "That it is common knowledge that automo-

biles rented in 1946 in the City of Pasadena are not necessarily intended to be entirely confined, as to their operations, to the municipal limits or physical boundaries of the City of Pasadena." (Finding XXXII.)

This finding was error for the reason that there was no evidence introduced to this effect and this observation was not within the issues since the question was: Did the parties to the insurance contract intend that the coverage beyond the jurisdiction of the City of Pasadena and its ordinance be compulsory or voluntary?

5. It was error for the Court to award judgment to plaintiff in the sum of $20,014.00 for the following reasons:

(a) The contract of insurance which is attached to plaintiff's complaint and marked Exhibit "A" and which is purportedly one of the bases of this action limits the liability of this defendant to $15,000.00 for personal injuries.

(b) The ordinance relied upon by plaintiff does not require insurance for property damage but requires insurance only for injuries to person.

(c) Plaintiff's complaint in Los Angeles Superior Court number 516890, which is the basis of the above-entitled action, is "a complaint for damages to person" and makes no [117] allegations concerning damage to property.

(d) Coverage "B" on page 2 of Exhibit "A" attached to plaintiff's complaint shows that property damage, as used by the parties, referred to "dam-

ages because of injury to or destruction of property, . . .". .

(e) Special damages arising out of personal injuries are not damages to property.

(f) There has been complete and full satisfaction of record in Los Angeles Superior Court action number 516890 by reason of defendant's payment to plaintiff of the sum of $3500.00. In any event defendant must receive credit for this sum, which should be deducted from the maximum policy limits of $15,000.00 for personal injuries. If there is any liability on the part of this defendant to plaintiff it cannot exceed $11,500.00.

6. For such other and further reasons as may be presented at the hearing on this motion.

The motion shall be heard upon the pleadings and papers, the minutes of the court, copy of the complaint in case number 516890, the memorandum of points and authorities filed herewith, and upon the affidavits of George E. Hosey, Sam G. Richardson, Elizabeth E. Richardson, Hulen C. Callaway, Robert E. Dunne, and R. W. Clayton.

Dated: May 4th, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

To Plaintiff and Paul DuBois His Attorney:

Please Take Notice That the undersigned will bring the above motion on for hearing before this Court at the courtroom of the Honorable James M. Carter, in the United States Courthouse in the City of Los Angeles on May 15, 1950, at 10:00 a.m., or as [118] soon thereafter as counsel can be heard.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant. [119]

[Title of District Court and Cause.]

AFFIDAVIT OF SAM G. RICHARDSON

State of California,
County of Sacramento—ss.

Sam G. Richardson, being duly sworn, deposes and says:

That he was involved in an accident on April 9, 1946, when the automobile which he was driving collided with a pedestrian in the vicinity of the 1200 block of San Gabriel Boulevard in the County of Los Angeles; that at said time and for several months subsequent thereto affiant operated a garage and service station at 836 South San Gabriel Boulevard, San Gabriel, California; that on or about the middle of June, 1946, affiant was informed by (name not recalled), a mechanic who at that time was working at the affiant's garage on a commission

basis, that a certain summons and complaint had been left with him during affiant's absence from the garage; that affiant filed no pleading in the said action; that several weeks subsequent thereto and on or about the 21st or 22d [124] day of July, 1946, affiant departed from the State of California and went to Fort Worth, Texas, where he visited his mother and friends and also obtained certain automobile accessories including tires, batteries and spotlights for sale at his garage in San Gabriel; that he remained in Texas for a period of four or five weeks; that at no time during the month of August, 1946, was affiant in the State of California or in the environs of San Gabriel; that at no time was affiant ever served with a summons or complaint or any papers in any action instituted by George N. Olmstead; that during the last ten or fifteen years affiant has never grown or worn a mustache, that affiant, in the year 1946 was 5 feet 9 inches in height, weighed 175 pounds and had straight hair the color of which is light brown sprinkled with grey, with grey hair at the temples; that affiant never at any time conducted a business at 804 South San Gabriel Boulevard, San Gabriel, California; that affiant states absolutely and positively that he at no time was ever served with any papers in any lawsuit involving one George N. Olmstead, or Alford P. Olmstead, or any

other person who may have been involved in the aforesaid collision of April 9, 1946.

/s/ SAM G. RICHARDSON.

Subscribed and sworn to before me this 10th day of April, 1950.

[Seal] /s/ C. R. BARTELLS,
Notary Public in and for
Said County and State.

My commission expires May 28, 1952. [125]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE E. HOSEY

State of Texas,
County of Tarrant—ss.

George E. Hosey, being first duly sworn, deposes and says:

That he has resided at Ft. Worth, Texas, for 48 years;

That he is personally acquainted with Sam G. Richardson and his mother, Mrs. Elizabeth E. Richardson, of 3507 Ada Street, Ft. Worth, Texas;

That in the latter part of July, 1946, the said Sam G. Richardson came to Ft. Worth, Texas; that he saw the said Sam G. Richardson daily from the latter part of July through the latter part of August, 1946; that he knows of his own knowledge that [126]

Sam G. Richardson was in Ft. Worth, Texas, on August 3rd, 1946.

/s/ GEORGE E. HOSEY.

Subscribed and sworn to before me this 20th day of April, 1950.

[Seal] /s/ GARRETT MIDDLEHOOF,
Notary Public in and for
Said County and State. [127]

[Title of District Court and Cause.]

AFFIDAVIT OF ELIZABETH E. RICHARDSON

State of Texas,
County of Tarrant—ss.

Elizabeth E. Richardson, being first duly sworn, deposes and says:

That she is the mother of Sam G. Richardson who formerly resided and conducted a business at 836 South San Gabriel Boulevard, San Gabriel, California; that she has lived in Ft. Worth, Texas, continuously for the last 18 years;

That in the latter part of July, 1946, her son, the aforesaid Sam G. Richardson, came to Ft. Worth, Texas, to visit her and to purchase certain automobile accessories for use and sale at his place of business in San Gabriel, California; that the said Sam G. Richardson remained in Ft. Worth, Texas, continuously from the latter part of July as aforesaid through to the latter part of August,

1946; that on August 3rd, 1946, the said Sam G. Richardson [128] was in Ft. Worth, Texas.

/s/ ELIZABETH E. RICHARDSON.

Subscribed and sworn to before me this 15th day of April, 1950.

[Seal] /s/ GEO. E. HOSEY,
Notary Public in and for
Said County and State. [129]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. DUNNE

State of California,
County of Los Angeles—ss.

Robert E. Dunne, being duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in the State of California; that he is one of the attorneys for defendant in the above-entitled case; that on the 10th day of April, 1950, at Folsom Prison, Reprisa, California, affiant, interviewed one Sam G. Richardson, inmate Number A-8152; that at said time and place the said Sam G. Richardson informed affiant that he had been incarcerated in prison since January, 1948; that he further informed affiant that his mother, Elizabeth E. Richardson, resided at 3507 Ada Street, Fort Worth, Texas, and that she and her neighbors could testify that the said Sam G. Richardson was in Fort Worth, Texas, on August 3, 1946; affiant further states that

the said Sam G. [130] Richardson has light brown hair streaked with gray and is gray at the temples.

/s/ ROBERT E. DUNNE.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal] /s/ ELIZABETH P. WILLIAMS.
Notary Public in and for
Said County and State. [131]

[Title of District Court and Cause.]

AFFIDAVIT OF HULEN C. CALLAWAY

State of California,
County of Los Angeles—ss.

Hulen C. Callaway, being first duly sworn, deposes and says:

That he is and has been one of the attorneys of record in the above-entitled case since it was filed and actively in charge of the defense of said case; that in connection with garnering the facts preparatory to filing the necessary pleadings in the defense of said case, this affiant endeavored to contact one Sam G. Richardson for the purpose of eliciting information necessary for the proper defense of the aforesaid action; that within a few days after the complaint was delivered to affiant's office he instructed one Frank E. Arnett, an investigator at that time regularly used by affiant for the purpose of interviewing witnesses and investi-

gagting law suits, to contact said Sam G. Richardson [132] for the purpose of obtaining certain information from him; that the affiant instructed Frank Arnett to immediately commence said investigation and instructed him to go to 836 South San Gabriel Boulevard, Los Angeles County, California, which was the business and home address given by said Sam G. Richardson to Blodgett Auto Service and if Sam G. Richardson could not be located there to make a neighborhood canvas to see if any of the neighbors knew said Sam Richardson's whereabouts; said Frank Arnett reported to affiant that said Sam Richardson was not found at the said address; that he made inquiry in and about the vicinity of said address and was unable to locate anyone who knew the whereabouts of Mr. Richardson; that thereafter Mr. Arnett was instructed to check the list of voters in Los Angeles County in order to ascertain any new address that the said Sam Richardson might have had. That the check of said list of voters was fruitless; that said Frank E. Arnett reported that he returned to said address on San Gabriel Boulevard and its vicinity several times and every time he was unable to find said Richardson or anyone who could give him a lead as to where he might be found. That an affidavit cannot be made by the said Frank E. Arnett for the reason that he died on February 8, 1950.

That thereafter affiant instructed one R. W. Clayton, a salaried investigator of the Royal Indemnity Company, to make other and further efforts to

find Sam G. Richardson or any of his relatives; that subsequently thereto R. W. Clayton reported that he had located Sam G. Richardson's brother and that he called upon the said brother twice; that on the first call the said brother was unable to give him Sam G. Richardson's exact whereabouts and asked him to return again; that upon returning the said R. W. Clayton was literally chased off the premises by Ed Richardson, as will more fully appear in R. W. Clayton's affidavit.

That after all efforts to locate said Sam G. Richardson had [133] been exhausted without success your affiant caused letters to be sent to the various penal institutions in the State of California inquiring whether Sam G. Richardson was an inmate of any of said institutions; that on or about the 15th day of March, 1950, a letter was received from Robert A. Heinze, Warden of the California State Prison at Folsom, stating that Sam Richardson was an inmate of said institution, a copy of which letter is attached hereto and hereby made a part hereof.

That affiant, as soon as it could expeditiously be accomplished without conflict with the trial calendar of affiant's office, dispatched Robert E. Dunne, one of the attorneys of affiant's law firm, to the California State Prison at Folsom to interview said witness, as will more fully appear from the affidavit of said Robert E. Dunne.

That in addition thereto affiant had made inquiry of the employees of the Blodgett Auto Service, the Sheriff's Office in Pasadena and other places too

numerous to mention, in an effort to locate said Sam Richardson, without success.

That the interview with Sam Richardson resulted in indicating that he had never been served with summons and complaint in Superior Court case number 516890, as will more fully appear by said Sam G. Richardson's affidavit; that in fact the affidavits of Sam G. Richardson, his mother Elizabeth E. Richardson and George Hosey show that the said Sam G. Richardson was in Fort Worth, Texas, on August 3, 1946, the date which he was purportedly served.

That the fact that no legal service had been had on said Sam G. Richardson has been discovered on April 10, 1950, and subsequent to the hearing of plaintiff's motion for summary judgment on April 3, 1950.

Affiant further states that the said evidence as set forth in said affidavits is material in its object and on another trial or hearing ought to produce an opposite result to that of a [134] summary judgment being entered against defendant herein, and that said evidence is not cumulative, corroborative or collateral.

/s/ HULEN C. CALLAWAY.

Subscribed and sworn to before me this 4th day of May, 1950.

[Seal] /s/ ELIZABETH P. WILLIAMS,
Notary Public in and for
Said County and State. [135]

(Copy)

State of California
Department of Corrections
California State Prison at Folsom

Represa, California

Robert A. Heinze, Warden

March 14, 1950

Please Refer to Richardson, Sam

File No. A-8152

Mr. W. H. Radermacher
Attorney at Law
210 West Seventh Street
Los Angeles 14, California

Dear Sir:

This will acknowledge your letter of March 9, regarding Sam Richardson, A-8152, an inmate of this institution, who is a witness of the case of Olmstead vs. Royal.

Subject is presently confined in this institution and you may interview him if you wish to do so. The most convenient time for interview would be on any week day, Monday through Friday, between the hours of 9 a.m. and 3 p.m. You may present this letter to the officer at the entrance gate and arrangements will be made to accommodate you.

/s/ ROBERT A. HEINZE,
Warden.

RAH:KT/b

[Title of District Court and Cause.]

AFFIDAVIT OF R. W. CLAYTON

State of California,
County of Los Angeles—ss.

R. W. Clayton, being first duly sworn, deposes and says: That he is an employee of the Royal Indemnity Company; that some of his duties are to investigate the facts and circumstances of certain assigned law suits and to contact and interview witnesses involved in the same; that on or about the 2nd day of March, 1950, affiant undertook to search for Sam G. Richardson pursuant to instructions received from the law firm of Tripp & Callaway prior to the aforesaid date; that affiant made phone calls to various people, including the Los Angeles County Sheriff's Office in El Monte; that he was unsuccessful in locating the said Sam Richardson or any of his relatives; that he then proceeded to 836 South San Gabriel Boulevard and was unable to find said Sam G. Richardson at that address; the address at 836 South San Gabriel was a vacant [137] service station and garage with a living quarters attached; affiant made inquiry in the neighborhood of this gas station and confirmed that Sam G. Richardson had conducted business at that gas station in the past; information obtained in a canvas of the area revealed that his brother Ed Richardson worked in the Puente area; that the address where the said Ed Richardson might be located in Puente is not now recalled by affiant; that affiant proceeded to Puente and was informed at the said address that Ed Richardson had worked there but had left to go into

business of his own, operating a gas station, which it was believed was located at South Rosemead and Mission in Rosemead, California; that affiant immediately proceeded to the said address and there contacted a man who identified himself as Ed Richardson, brother of the aforesaid Sam G. Richardson; that Ed Richardson advised that he could not give the actual whereabouts of Sam G. Richardson but indicated that he was in a penal institution somewhere in the State of California but he did not know whether it was a city, county or state institution; that affiant further inquired from the said Ed Richardson as to former employees of the said Sam G. Richardson who might know of the said Richardson's present whereabouts; that affiant was informed that the said Ed Richardson could not presently recall the names of any of the said employees but that if he could be given 24 hours he might be able to locate some of the former employees or their names; that affiant returned to see Ed Richardson two days later; that upon recognizing affiant Ed Richardson ordered him off the premises and further ordered him never to return; affiant inquired as to why there was such a sudden change in his attitude since affiant had returned at the invitation of the said Ed Richardson and he was informed by the said Ed Richardson he had been thinking it over and he didn't want to become involved in anything pertaining to his brother; that from time to time during this two day period affiant reported the [138] progress of his investigation to the law firm of Tripp & Callaway and after being ordered off the premises of Ed Richardson by that person

affiant recommended to the aforesaid attorneys that a search of the penal institutions throughout the state should be made for the purpose of finding Sam G. Richardson.

/s/ R. W. CLAYTON.

Subscribed and sworn to before me this 4th day of May, 1950.

[Seal] /s/ ELIZABETH P. WILLIAMS,
Notary Public in and for
Said County and State.

Exhibit X

In the Superior Court of the State of California in and for the County of Los Angeles

No. 516890

GEORGE N. OLMSTEAD, by Alford P. Olmstead, his Guardian ad Litem,

Plaintiff,

vs.

SAM G. RICHARDSON, ROY JORDAN, Individually, as Executor of the Estate of Harry E. Blodgett, Deceased, and as Trustee under the Last Will and Testament of Harry E. Blodgett, Deceased, JOHN DOE, DOE COMPANY, a corporation, and DOE AND ROE, a co-partnership,

Defendants.

COMPLAINT FOR DAMAGES TO PERSON

Comes now the plaintiff and for cause of action against the defendants alleges:

I.

That plaintiff, George N. Olmstead, is an incompetent person; that on the 16th day of July, 1946, on application duly made, Alford P. Olmstead, the brother of plaintiff, was duly appointed by the above Court the Guardian Ad Litem of said George N. Olmstead for the purposes of this action.

II.

That the names John Doe, Doe Company, a corporation, and Doe & Roe, a co-partnership, are the fictitious names of defendants, whose true names are to this plaintiff unknown, and plaintiff [140] asks that when such true names are discovered, this complaint may be amended by inserting said true names in the place of and stead of said fictitious names.

III.

That at all times mentioned herein plaintiff was and still is a resident of the County of Los Angeles, State of California.

IV.

That at all times mentioned herein, South San Gabriel Boulevard was and now is a public highway of the County of Los Angeles, State of California; that said South San Gabriel Boulevard runs in a northerly and southerly direction; that the 1200 block of said San Gabriel Boulevard is a residence district.

V.

That on or about the 9th day of April, 1946, at or about the hour of 2:50 a.m. of said day, plaintiff was walking in a careful and prudent manner in a northerly direction along and upon said South San Gabriel Boulevard at or about the 1200 block; that at said time and place defendant, Sam G. Richardson, having the charge, management and control of a certain 1940 Packard automobile, bearing license number 10L343, negligently, carelessly, recklessly and unlawfully drove and operated said automobile in a northerly direction along and upon said South San Gabriel Boulevard, without due regard to the safety and convenience of pedestrians along and upon said highway, and particularly of this plaintiff, so that said automobile struck, and ran into, upon and over plaintiff with great force and violence, and thereby knocked him down and caused him to strike the pavement; that as a direct and proximate result of the careless, recklessness, negligence and unlawful acts of said defendant, Sam G. Richardson, as aforesaid, plaintiff was broken, bruised and injured about the body, head and extremities, and more in particular received fractures of the head, lacerations of the [141] head and scalp, bruises and scratches about the body, paralysis of the left arm, inner disturbances of the body, injury to the brain, loss of memory, loss of consciousness, contusions, concussion, mental aberrations, shock, pain, anguish, anxiety, nervousness, and other injuries which at this time cannot be fully ascertained, and plaintiff further believes and therefore alleges

there never will be a full recovery, all to his damage in the sum of Seventy-five Thousand Dollars ($75,000.00).

VI.

That by reason of said injuries and premises as aforesaid, plaintiff was required to engage the services of a physician and surgeon to treat, perform surgery, supply medicines, anesthetics and X-rays, and was further caused to engage nursing, sanitarium, and other attendant services, and hospitalization for his care, all to his damage in the sum of $3,698.10; that plaintiff has become obliged to pay for the aforesaid and will be obliged to pay for additional similar services and treatment in the future, the exact amount of which is unknown at this time; that plaintiff will ask leave of this Court to amend his Complaint when the exact amount of said additional obligations are ascertained and insert herein the amount so ascertained.

VII.

That by reason of said inquries and premises as aforesaid, plaintiff was unable and will be unable for an indefinite period to work in any employment and/or engage in any business activity, and therefore has lost earnings which plaintiff is informed and believes and on that ground alleges at or about the rate of $300.00 per month, all to his damage as of this date in or about the sum of $1,000.00, and will lose future earnings at said rate, the exact total amount of which is unkown at this time; that plaintiff will ask leave of this Court to amend his

complaint when the exact amount of said future earnings is ascertained and insert herein [142] the amount so ascertained.

VIII.

That by reason of said inquiries and premises as 15th day of February, 1946, in the County of Los Angeles, State of California; that on or about the 21st day of February, 1946, by an Order duly given, made and entered in the above-entitled Court, defendant Roy Jordan was appointed Special Administrator of the Estate of said Harry E. Blodgett, Deceased, and on said day was duly qualified as such Special Administrator, and Special Letters of Administration of said estate were thereupon issued to him out of said Court; that on or about the 18th day of March, 1946, by an Order duly given, made, and entered in the above-entitled Court, defendant Roy Jordan was appointed Executor of said estate of Harry E. Blodgett, Deceased, and thereafter, on or about the 20th day of March, 1946, he duly qualified as such Executor and Letters Testamentary of said estate were thereupon issued to him out of said Court, and he has ever since been, and now is, the duly qualified and acting Executor of the said estate of Harry E. Blodgett, Deceased.

IX.

That defendant Roy Jordan was at all times mentioned herein, and now is, the Trustee of a trust estate created under the Last Will and Testament of said Harry E. Blodgett, Deceased, now in probate in the above-entitled Court, which defendant Roy

Jordan was, and now is, the Executor thereof as set-forth in paragraph VIII above.

X.

That defendant Roy Jordan at all times mentioned herein had authority to continue and conduct the business of said deceased at the risk of said estate and/or said trust by virtue of Orders of the above-entitled Court as said Special Administrator and/or as said Executor, as Trustee under said Trust, as said Executor as authorized under said will, and implied by law or equity. [143]

XI.

That part of the business and assets of said estate and said Trust was said 1940 Packard automobile referred to herein, which said estate, and/or said trust was at all times mentioned herein the owner or owners thereof.

XII.

That said 1940 Packard automobile was used and operated by defendant Sam G. Richardson at the time and place mentioned herein with the permission, consent and acquiescence of defendant Roy Jordan individually, as said Executor, and/or as Special Administrator of said estate, and as said Trustee.

XIII.

That plaintiff is informed and believes, and on that ground alleges: that at all times mentioned herein defendant Sam G. Richardson was driving

and operating said automobile as the agent, employee and/or servant, and doing so within the course of his employment and/or agency for the defendant individually, as said Executor and/or Special Administrator of said estate, and as said Trustee.

Wherefore, Plaintiff demands judgment against the defendants and each of them, as follows:

1. General damages in the sum of $75,000.00.

2. Special damages for medical services, etc. as alleged herein in the sum of $3,698.10, and for loss of earnings as alleged herein in the sum of $1,000.00.

3. Special damages as may be found further due under the allegations and proof herein for medical services, etc. and loss of earnings at the time of the trial hereof.

4. For costs of suit incurred and to be incurred herein.

5. For such other relief as the Court may deem meet and just in the premises.

HOWARD C. VELPMEN &
JOHN N. HURTT,

By HOWARD, C. VELPMEN,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 5, 1950. [144]

[Title of District Court and Cause.]

STATEMENT OF REASONS IN OPPOSITION TO MOTION

(Rule 3d, Local Rules
Southern District, California)

Plaintiff opposes defendant's motions in entirety on the grounds that the issues raised are: (1) admitted by pleadings; (2) not contrary to law; (3) laches; (4) estoppel; (5) improper forum; (6) improper moving party; (7) Section 473a C.C.P.; (8) insufficient application and showing; (9) judgment valid on its face; (10) defendant not free from fault; (11) collateral attack is improper; and (12) findings were settled according to rules.

Respectfully submitted,

Dated this 10th day of May, 1950.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff. [146]

COUNTER-AFFIDAVIT OF C. PAUL DuBOIS

State of California,
County of Los Angeles—ss.

C. Paul DuBois, being duly sworn, deposes and says:

That affiant has been personally familiar with prosecuting of this plaintiff's claims arising out of his injuries since their occurrence on April 9, 1946.

That on or about June 7, 1946, this plaintiff

caused to be filed in the Superior Court of the State of California in and for the County of Los Angeles his action for personal injuries and damages sustained as a result of the casualty above referred to, and that said action was numbered 515192 and included as defendants: "Sam G. Richardson, Harry E. Blodgett, John Doe, Doe Company, a corporation, and Doe and Roe, a co-partnership." That shortly thereafter an answer on behalf of Roy Jordan as executor of the Estate of Harry E. Blodgett, deceased, was filed by the law firm of Tripp, Callaway, Sampson and Dryden wherein the verification by Roy Jordan is dated June 27, 1946. That affiant is informed and believes and thereupon alleges that said counsel for said defendant were acting for and on behalf of Royal Indemnity Company in affording said defense.

On July 16, 1946, plaintiff herein caused to be executed and filed a dismissal without prejudice in said Superior Court Action.

That on July 18, 1946, plaintiff herein caused to be filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action for the same damage resulting from the same casualty against: "Sam G. Richardson, Roy Jordan, individually, as executor of the Estate of Harry E. Blodgett, deceased, and as trustee under the Last Will and Testament of Harry E. Blodgett, Deceased, John Doe Company, a corporation, and Doe and Roe, a co-partnership," with said case being numbered 516890. [169] That affiant refers to a certified photostatic copy of the records of said case annexed

hereto as "Exhibit 1" and incorporated by this reference at this point as though set out in full. That said exhibit is the original summons and return of service by the sheriff's office in said suit. That thereafter the law firm, Tripp, Callaway, Sampson and Dryden, filed an answer in said action on behalf of Roy Jordan, executor of the estate of Harry E. Blodgett, deceased, and as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and the verification of said Roy Jordan upon said answer is dated July 29, 1946. That affiant is informed and believes and thereupon alleges that said law firm represented Royal Indemnity Company in affording defense to the said Roy Jordan. That on August 14, 1946, plaintiff served and filed his Memorandum for Setting for Trial in Superior Court action No. 516890 serving a copy thereof on Tripp, Callaway, Sampson and Dryden. That on September 3, 1946, plaintiff herein caused to be served and filed upon Tripp, Callaway, Sampson and Dryden Notice of Trial in action 516890 wherein the Superior Court had set for trial the said case for the 17th of April, 1947, at 9:15 a.m. in the Department of the Presiding Judge. That on September 5, 1946, plaintiff herein caused to be filed an affidavit re: Military Service in Superior Court case No. 516890 and pertaining to Sam G. Richardson. That on September 12, 1946, A. E. Paonessa, as Judge of the Superior Court in Superior Court action No. 516890, signed Findings of Fact and Conclusions of Law in disposition of said case against Sam G. Richardson, and on said date

also signed, filed and entered judgment against the said Sam G. Richardson.

That on September 18, 1946, plaintiff caused to be recorded in the Office of the Recorder of Los Angeles County an abstract of judgment. That annexed hereto as "Exhibit 2" is a photostatic copy of said abstract of judgment and affiant refers [170] to said exhibit by this reference and incorporates the same at this point as though set out in full.

That on February 7, 1947, the California State Department of Motor Vehicles issued and sent registered mail to Sam G. Richardson the order of said department suspending the driver's license of said Sam G. Richardson. That affiant refers to "Exhibit 3" annexed hereto as a photostatic copy of said Order of Suspension.

That affiant has examined the records of the sheriff of the County of Los Angeles which records are original long-hand entries and show that on February 19, 1947, George M. Bankstone, deputy sheriff of said county, did, pursuant to plaintiff's request of February 17, 1947, levy upon all real and personal property of Sam Richardson at 836 South San Gabriel Boulevard pursuant to a Writ of Execution issued by said Superior Court in case No. 516890, and that the said sheriff put a keeper named Blaney in possession of the premises located at 836 South San Gabriel Boulevard pursuant to said Writ of Execution, and that said keeper remained in daily continuous occupation thereafter over said premises until October 1, 1947, at which time the personal property therein situated were transferred

to storage by the sheriff and that said personal property still remains in storage under the writ of attachment hereinabove referred to. That the sheriff's records also indicate that on January 19, 1946, Sam Richardson leased Lots 65, 66, 67 and 68 of Block 101 of the East San Gabriel Tract being the premises at 836 South San Gabriel Boulevard, from Hayao Yoshinura as guardian of Raymond Yoshinura for a five year term to and expiring on December 31, 1950, with said lease being recorded February 18, 1947; that thereafter Sam Richardson and Mable M. Richardson, his wife, sub-leased the said real property to Seaside Oil Company with the said property to be used as a service station. [171]

That on March 22, 1947, Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden took the deposition of plaintiff herein and Alfred P. Olmstead and thereafter said deposition was duly transcribed and served.

That on April 22, 1947, plaintiff's counsel and Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden signed a written stipulation and approval of a form of judgment stipulated by said counsel in open court wherein plaintiff took judgment against Roy Jordan, executor of the Estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, wherein it is provided:

> "Upon the receipt of said sum to plaintiff, his guardian ad litem and plaintiff's attorney are authorized to execute a satisfaction of *said judgment* (italics our) and the clerk is ordered

to enter this judgment accordingly and to enter a satisfaction thereof when so executed."

That on April 23, 1947, plaintiff caused to be executed and filed a satisfaction of judgment wherein the judgment of April 22, 1947, is identified and which provides:

"The judgment having been paid, full satisfaction is hereby acknowledged . . . in favor of plaintiff and against defendant, Roy Jordan, executor for the Estate of Harry E. Blodgett, deceased, and as testamentary trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and the clerk is hereby authorized and directed to enter full satisfaction of record in said action."

That on April 21, 1947, plaintiff's counsel addressed a letter to Hulen C. Callaway and Tripp, Callaway, Sampson and Dryden wherein it is provided in part:

"It is my understanding with you that defendant Roy Jordan waives all right of subrogation against defendant Sam G. Richardson and farther a satisfaction of judgment against Roy Jordan [172] will not satisfy the judgment against Sam G. Richardson."

That thereafter plaintiff's counsel received a letter from Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden dated April 25, 1947, wherein it is said:

"Pursuant to your suggestion, this is to ad-

of my sight during the necessary time it took to vise that although the draft of the Royal Indemnity Company payable to George N. Olmstead and Alford P. Olmstead, his guardian ad litem, and H. C. Velpmen, stated on its face, 'Dismissal with prejudice Superior Court action 516890,' this was actually in satisfaction of judgment of the above-numbered case insofar as the defendant Roy Jordan, executor for the estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and not otherwise.

"I am authorized on behalf of my principal, the Royal Indemnity Company, to waive any right of subrogation against the co-defendant Sam G. Richardson."

That on March 9, 1948, plaintiff herein caused to be filed in Superior Court of the State of California in and for the County of Los Angeles his Petition to Perpetuate Testimony wherein Royal Indemnity Company, a corporation, and certain Does were defendants in action No. 542793. That on April 23, 1948, plaintiff's counsel in the presence of Hulen C. Callaway took the depositions of Roy R. Jordan and Bert J. Hull as the authorized representative of Royal Indemnity Company, and thereafter said depositions were duly transcribed, corrected, signed and filed.

That thereafter plaintiff caused to be filed in the Superior Court of the State of California in and for the County of Los Angeles on September 14, 1948, being case No. 549780, plaintiff's action against

Royal Indemnity Company on its policy issued to the said Blodgett, which suit was the out-growth of information [173] on the depositions taken in Superior Court action No. 542793 on April 23, 1948, of Bert J. Hull and Roy R. Jordan. That thereafter defendant Royal Indemnity Company moved to transfer said Superior Court action, last aforesaid, on the 24th day of September, 1948, and said action was removed to the Federal Court on April 24, 1948.

That thereafter on January 27, 1949, plaintiff's counsel by affiant wrote to Hulen C. Callaway wherein plaintiff's counsel cited Krueger vs. California Highway Indemnity and demanded renewed consideration toward the settling of said case and claim.

Examination of the records of Los Angeles Municipal Court reveals action No. 795847 wherein Sam G. Richardson is the defendant in an action for an account stated for the non-payment of rent at the service station heretofore identified as 836 South San Gabriel Boulevard and the records in said case reveal that deputy sheriff F. E. Tumbleson served Sam G. Richardson with a copy of summons and complaint within the County of Los Angeles on January 31, 1947.

/s/ C. PAUL DuBOIS.

Subscribed and sworn to before me this 10th day of May, 1950.

[Seal] /s/ Indistinguishable,
Notary Public in and for
Said County and State.

Exhibit No. 1

In the Superior Court of the State of California
in and for the County of Los Angeles
No. 516890

GEORGE N. OLMSTEAD, by Alford P. Olmstead, his Guardian ad Litem,

Plaintiff,

vs.

SAM G. RICHARDSON, ROY JORDAN, Individually, as Executor of the Estate of Harry E. Blodgett, Deceased, and as Trustee under the last Will and Testament of Harry E. Blodgett, deceased, JOHN DOE, DOE COMPANY, a Corp., and DOE & ROE, a co-partnership,

Defendants.

SUMMONS

The People of the State of California Send Greetings to:

Sam G. Richardson, Roy Jordan, Individually, as Executor of the Estate of Harry E. Blodgett, Deceased, and as Trustee under the last Will and Testament of Harry E. Blodgett, Deceased, John Doe, Doe Company, a corporation, and Doe & Roe, a co-partnership, Defendants.

You are directed to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served else-

where, and you are notified that unless you appear and answer as above required, the plaintiff will take Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 18th day of July, 1946.

J. F. MORONEY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By /s/ K. MEACHEM,
Deputy.

(Seal Superior Court, Los Angeles County)

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C.C.P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk. [175]

Return on Summons

Office of the Sheriff,
County of Los Angeles,
State of California—ss.

I Hereby Certify that I received the within summons on the 31st day of July, 1946, and on the 3rd day of August, 1946, I personally served the same on

Sam G. Richardson being one of the defendants named in said summons, by delivering to said defendant personally in the said County of Los Angeles, a copy of said summons and a copy of the complaint in the action named in said summons, attached to said copy of summons.

E. W. BISCAILUZ,
Sheriff.
By /s/ R. W. CARTER,
Deputy Sheriff.

Dated at Los Angeles, August 3, 1946.

[Endorsed]: Filed Aug. 14, 1946, Superior Court. [176]

Certificate

No. 516890

State of California,
County of Los Angeles—ss.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Summons (including return attached thereto), filed August 14th, 1946, on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 10th day of May, 1950.

HAROLD J. OSTLY,
County Clerk.

[Seal] By /s/ J. ROBERT PENDLEY,
Deputy.

Exhibit No. 2

County of Los Angeles
Office of Sheriff

Eugene W. Biscailuz, Sheriff
Arthur C. Jewell, Under-Sheriff
Los Angeles 12, California

R. W. Carter, Deputy Sheriff of Los Angeles County, hereby disposes and says: That on August 3rd, 1946, at approximately 12:30 p.m. I drove into a service station on the northwest corner of San Gabriel Blvd. and Mission Drive in the City of San Gabriel and made inquiry of the owner, Robert S. Halloway, regarding one Sam Richardson, operator of a service station located approximately 125 yards north of Mission Drive on the northeast corner of San Gabriel Blvd. and Grand Ave. Mr. Halloway informed me that he knew Sam Richardson and pointed him out to me from among a scattered group of three or four men in the station. I went immediately to that station but in the short time necessary to get there the person pointed out to me had disappeared into one of the rooms of the building on the grounds and could not be seen. I asked no questions but had the attendant put five gallons of gas in my car, paid for it and drove out. I went again to the station of Mr. Halloway, told him what happened and we stood inside his station for perhaps 15 or 20 minutes before Sam Richardson again put in an appearance. Then I again drove to his station and he was never out

of my sight during the necessary time it took to drive over there and when I arrived he was standing on the curb facing San Gabriel Blvd. and in front of a building bearing number 836 which building was a part of the station property and located on the northerly portion of the property. [175] I stopped my car directly in front of Mr. Richardson, opened the right front door and stepped out directly alongside of Mr. Richardson. I asked him if he was Sam Richardson, he replied, "I am." I told him I was from the Sheriff's office and that I had a Summons and Complaint in the case of Olmstead vs. Richardson. He asked what it was all about. I showed him the Complaint that it was relative to an accident and he said, "Oh, that is something that happened three or four months ago." I got back in my car and made notations on the back of the service ticket to wit: Sam Richardson, 5 ft. 7 or 8 inches, 150-160 lbs., black wavy hair, small mustache. Asked what it was all about; I showed him Complaint, he then remarked "Oh, that is something that happened 3 or 4 months ago."

E. W. BISCAILUZ,
Sheriff.

By /s/ R. W. CARTER,
Deputy Sheriff.

Subscribed and sworn to before me this day of May 9th, 1950.

[Seal] /s/ ELLEN C. NEILAN.
Clerk of Justice's Court of San Gabriel Township, County of Los Angeles, State of California.

Exhibit No. 3

State of California
Department of Motor Vehicles
Division of Drivers Licenses

In the Matter of Suspension of the Privileges of Operating and Registering Motor Vehicles in California of

Sam Gingle Richardson also known as Sam G. Richardson
836 S. San Gabriel Blvd.
San Gabriel, California.

Order of Suspension

Operator's License W 335589
Chauffeur's License all in your name.
License Plates and Registration Cards 69B841—Pack.—C308173A

File No. X-13205

Case: Olmstead vs. Richardson.

Court: Superior of Los Angeles Co. Action No. 516890.

It appearing from the records of this department that the herein above named person is a judgment debtor in the above-entitled case and that he has failed to comply with the provisions of the Vehicle Code governing such matters.

Therefore, It Is Ordered That the privilege of such person to operate a motor vehicle upon the highways of this state and any and all operators' and chauffeurs' licenses evidencing such privilege

and all license plates and registration cards issued to him are hereby suspended.

This suspension will remain in effect until reinstated by this department. Means by which reinstatement may be effected are outlined on the attached sheet of instructions.

This action is taken under the authority of Section 410 of the Vehicle Code of California.

Demand Is Hereby Made for the Surrender to the Department of Motor Vehicles of any and all operators' and chauffeurs' licenses and all license plates and registration cards issued to you. Failure to comply with this demand is punishable as a misdemeanor under Section 338 of the Vehicle Code of California.

Dated this 7th day of February, 1947.

EDGAR E. LAMPTON,
Director of Motor Vehicles.

[Seal] By /s/ A. J. HOWE,
Supervisor.

Certificate of Registration and Mailing

The undersigned hereby certifies that, on the date below, he or she, as an officer or employee of the Department of Motor Vehicles, deposited in the United States Mail, Registry Division, at Sacramento, an original of the order to which this is affixed, in an envelope addressed to the person named in the order, at his or her last address as shown on the records of the Department, postage

prepaid and accompanied by Registry and Return Receipt fees.

2/7/47.

/s/ A. R. DROLLET,
Officer or Employee of
Department.

[Endorsed]: Filed May 10, 1950. [177]

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Motor Vehicles.

5/15/50.

DEPARTMENT OF MOTOR VEHICLES,

By /s/ G. SAWYER,
Officer or Employee.

[Title of District Court and Cause.]

Memorandum—

FINDINGS OF FACT SUPPORTED BY:

Plaintiff does not waive the point by supplying this memorandum requested by the Court but continues to urge that Royal Indemnity failed, prior to the signing of the Findings and Conclusions, to file objections to the proposed Findings.

I.

References hereinafter to plaintiff's amended complaint will be abbreviated "comp"; to plaintiff's request for admissions as "ad"; to plaintiff's interrogatories as "int."

II.

(a) Finding IV Ordinance Declaratory of Public Policy—comp Exhibit A, VII; Opinion of Justices 251 Mass. 569.

(b) VII The Policy (Exhibit A) as Required and Compulsory—comp VII and Page 3 lines 20, 21, 22, 23; Merchants v. Peterson 113 F(2d) 4.

(c) XIII Richardson on April 9, 1946, Driving the Packard with Permission and Consent Involved in an Accident—comp IX; ad 15, 1, [179] 2, 5, 8, 9, 11; int. 6.

(d) XVI Plaintiff Sustained Bodily Injury and Property Damage—comp XI page 5 line 28-32; ad 6, 7, 8.

(e) XVII Richardson Renter on April 7, Driver on April 9, Defendant in Superior Court and Judgment Debtor—comp XI; ad 1, 15, 2, 5, 6, 7, 8, 9.

(f) XVIII Royal Had Actual Notice June 12, 1946—comp XIII; int 17, 20, 21, 15, 16, 19, 24.

(g) XX Plaintiff's Judgment Unpaid—at 12, int 31, Affidavit of George N. Olmstead executed February 13, 1950.

(h) XXIV Royal Not Prejudiced—ad 12, 14; int 20, 21, 15, 16, 17, 19, 23, 24, 26, 28, 5, 2, 3, 4, 7, 8, 9, 10, 14, 22, 27, 30, 32, 34.

(i) XXV Royal's Opportunity to Defend—ad 14; int 20, 21, 15, 16, 17, 19, 23, 24, 26, 30, 34.

(j) XXVIII Royal's Admission of Consent—ad 11;

(k) XXIX Judgment Not Satisfied—int 31.

(l) XXXII Common Knowledge Regarding

Area of Operation—comp Exhibit A, VI page 3 lines 8-9, III, V.

Respectfully Submitted,
/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1950. [180]

In the District Court of the United States, Southern District of California, Central Division

No. 8729-C

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation, et al.,

Defendant.

MEMORANDUM DECISION

James M. Carter, U. S. District Judge.

The following matters were taken under submission:

(1) Motion for new trial and to set aside summary judgment heretofore entered;

(2) Motion for leave to file amendment to the answer.

The motion for new trial and to set aside the judgment raises three problems:

1. The effect of defendant's contention that there was not personal service on Sam Richardson in the Superior Court action. Relief under this point is denied for the following reasons:

(a) This is a suit on a Superior Court judgment, and the judgment is valid on its face;

(b) Defendant has not moved to set aside the Superior Court judgment, nor filed any independent action to contest the issue of personal service in the Superior Court action;

(c) Defendant has not been diligent, since it appears that at least by March 14th, the date of the letter [182] from the Warden at Folsom, defendant knew the whereabouts of Sam Richardson and could have interviewed him. This case was not decided until April 11th. The order granting the motion for summary judgment was made April 27th and judgment was entered April 27th. The affidavit of Robert E. Dunne on file shows he did not interview Sam G. Richardson until April 10th. Even this date was prior to the date of the court's decision and prior to the entry of judgment. Dunne's affidavit was not filed until May 5th, 1950;

(d) The court is convinced that Sam G. Richardson was served with process shown by affidavit of the Deputy Sheriff who made the service;

(e) Defendant is making a collateral attack in this action, on a judgment which is valid on its face.

2. Defendant contends that the sum of $5000.00 was erroneously awarded as property damage. Re-

lief must be denied on this contention. Paragraph XI of amended complaint alleges that in the Superior Court action No. 516890, the court found that "plaintiff had been damaged on account of said bodily personal injury in the sum of $25,000.00, and that plaintiff's estate and property was injured, wasted, destroyed, taken or carried away on account of expenses in the sum of $4,357.00 and on account of loss of earnings in the sum of $1,643.00" and that plaintiff obtained judgment for these sums in the Superior court action. Defendant's answer to the amended complaint admits by not denying, these allegations.

Secondly, the California Supreme Court, by its decision in Hunt v. Authier, 28 Cal. 2d 288, and Moffat v. Smith, 33 Cal. 2d 905, has laid down a new definition of property in connection with Sec. 574 of the Probate Code. Should these cases [183] continue to be good law; there is no reason to believe that this definition will be limited to cases under the Probate Code; and based on these cases and the admitted allegations of the amended complaint, the award of $5,000.00 under the property damage provisions of the policy of insurance is proper.

3. The defendant contends that the sum of $3,500.00 paid in satisfaction of the judgment in favor of plaintiff and against defendant, Roy R. Jordan, Executor of the Estate of Harry E. Blodgett, deceased, should be credited against any monies due the plaintiff in this action in the Federal Court. There were apparently two judgments entered in

Superior Court action No. 516890; (1) the judgment for $3,500.00 against Jordan as Executor of the Estate of Harry E. Blodgett; (2) the judgment against Sam G. Richardson for $31,000.00. The correspondence between the parties attached to plaintiff's "statement of reasons in opposition to motion," are not entirely satisfactory as to their meaning. They are, however, undenied. Plaintiff wrote that it was his understanding that a satisfaction of judgment against Jordan "will not satisfy the judgment against Sam G. Richardson." The attorney for the defendant replied that the $3,500.00 "was actually in satisfaction of judgment of the above-numbered case insofar as the defendant Roy Jordan * * *" and further that the Royal Indemnity Company "waives any right of subrogation against the co-defendant Sam G. Richardson."

Defendant's liability must be measured by its policy, which was to pay $15,000.00 for personal injury and $5,000.00 for property damage. Blodgett and Jordan were assureds, and any person who might rent a car from Blodgett or Jordan was an additional assured. [184]

The policy could not be construed to impose a liability to the extent of $20,000.00 upon both the owner of the car (Jordan or Blodgett) and the driver of the car. In the ordinary owner-driver situation, the insurance company, upon satisfaction of the judgment against the owner would be subrogated to the owner's rights against the driver. In the ordinary owner-driver situation, there would not be two recoveries, namely one against the owner

and one against the driver. The injured plaintiff would have two causes of action, but he would be entitled to only one satisfaction of the wrong done him and the doubling up of a recovery by the injured plaintiff would be prevented by the insurance company's exercise of its right of subrogation.

The court cannot find that it was the intention of the defendant insurance company, by the correspondence referred to above, to agree to what amounts, in substance, to a double recovery. Accordingly, the judgment will be modified as follows:

Plaintiff will prepare new findings of fact to provide in finding XXIX, that defendant's liability to the plaintiff under its insurance policy has been partially discharged to the extent of $3,500.00 and that plaintiff's recovery herein will be the sum of $16,500.00 plus $14.00 costs and interest, instead of $20,000.00 plus costs and interest. Plaintiff's conclusions of law will be likewise so modified, and a new judgment will be entered as indicated.

The motion for leave to file an amendment to the answer will be denied for the reasons set forth heretofore.

The clerk will enter a suitable Minute Order.

[Endorsed]: Filed May 22, 1950. [185]

[Title of District Court and Cause.]

MINUTE ORDER MAY 22, 1950

Calendar of Hon. James M. Carter, Dist. Judge.

It is ordered as follows:

(1) Motion for new trial is denied;

(2) Motion to set aside the judgment is granted;

(3) A new judgment in the sum of $16,500.00 plus $14.00 costs plus interest will be entered in favor of the plaintiff;

(4) Plaintiff will prepare new findings of fact and conclusions of law and judgment as indicated in the memorandum decision filed herewith;

(5) Motion to file an amendment to the answer is denied. [186]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 26th day of June, in the year of our Lord one thousand nine hundred and fifty. Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER JUNE 26, 1950

Counsel for plaintiff having submitted to the Court proposed form of new findings and judgment pursuant to the Court's decision of May 22, 1950, and the Court having considered the matter:

It Is Ordered that the memorandum decision of May 22, 1950, be and it is amended by changing the paragraph beginning on line 19 of page 4 to read as follows:

"Plaintiff will prepare new findings of fact to provide in finding XXIX, that defendant's liability to the plaintiff under its insurance policy has been partially discharged to the extent of $3,500.00, and that plaintiff's recovery herein will be the sum of $16,500.00 plus $14.00 costs and interest, instead of $20,000.00 plus costs and interest. Plaintiff's conclusions of law will be likewise so modified, and a new judgment will be entered as indicated."

The Clerk is directed to make said change by interlineation on the face of the original decision;

It Is Further Ordered that in the findings filed herein April 27, 1950, at line 21 on page 6, the word "July" be changed by the Clerk by interlineation to read "June";

It Is Further Ordered that Finding XXIX in the findings filed April 27, 1950, be stricken, and the Clerk is directed to so mark it on the face of the original findings.

The Court having examined the proposed form of new findings submitted by counsel, and it appearing that they do not meet with the Court's satisfaction, the Court has re-drafted said new findings, and now signs and files them, together with the judgment. [187]

[Title of District Court and Cause.]

MODIFIED FINDING OF FACT AND CONCLUSION OF LAW

(Pursuant to May 22, 1950, Minute Order)

And Minute Order of June 26, 1950

The above-entitled cause came on regularly for disposition on defendant's Royal Indemnity Company, motion for leave to file an amendment to the answer, motion for new trial and to set aside the judgment before the Honorable James M. Carter, District Judge of the above-entitled court, on May 15, 1950, and said motions were orally argued; that plaintiff appeared by his attorney, C. Paul DuBois; that defendant, Royal Indemnity Company, a corporation, appeared by its attorneys, Tripp & Callaway by Hulen C. Callaway.

That after hearing the arguments and examining the pleadings, motions and affidavits in support of the motions, memoranda of points and authorities having been heretofore filed in support of and in opposition to said motions, and the matter having been submitted to the court for its decision, and the court being fully advised in the premises, now modifies Finding of Fact [188] numbered XXIX substitutes in lieu of Finding XXIX hereinbefore entered the following and modified Finding of Fact:

XXIX

That in Superior Court action No. 516890, County of Los Angeles, entitled, "George N. Olmstead v.

Sam G. Richardson, the Estate of Harry E. Blodgett, Deceased, et al.," two judgments were entered in behalf of the plaintiff, George N. Olmstead; one entered on or about April 17, 1947, against Roy R. Jordan, Executor of the estate of Harry E. Blodgett, deceased, for the sum of Thirty-five hundred dollars ($3500.00) and a second and separate judgment against Sam G. Richardson, dated September 12, 1946; in the same case and in the same court in the sum of Thirty-one thousand dollars ($31,000.00) together with plaintiff's costs in the sum of Fourteen dollars ($14.00).

That on April 18, 1947, the defendant, Royal Indemnity Company paid to the plaintiff the sum of Thirty-five hundred dollars ($3500.00), in satisfaction of the judgment against Roy R. Jordan, Executor of the estate of Harry E. Blodgett.

That on April 21, 1947, plaintiff's counsel addressed a letter to Hulen C. Callaway and Tripp, Callaway, Sampson and Dryden wherein it is provided in part:

"It is my understanding with you that defendant Roy Jordan waives all right of subrogation against defendant Sam G. Richardson and farther a satisfaction of judgment against Roy Jordan will not satisfy the judgment against Sam G. Richardson."

That thereafter plaintiff's counsel received a letter from Hulen C. Callaway for Tripp, Callaway, Sampson and Dryden dated April 25, 1947, wherein it is said:

"Pursuant to your suggestion, this is to advise that although the draft of the Royal Indemnity Company [189] payable to George N. Olmstead and Alford P. Olmstead, his guardian ad litem, and H. C. Velpman, stated on its face, "Dismissal with prejudice Superior Court action 516890," this was actually in satisfaction of judgment of the above numbered case insofar as the defendant Roy Jordan, executor for the estate of Harry E. Blodgett, deceased, and as Testamentary Trusteee under the Last Will and Testament of Harry E. Blodgett, deceased, and not otherwise.

"I am authorized on behalf of my principal, the Royal Indemnity Company, to waive any right of subrogation against the co-defendant Sam G. Richardson."

The plaintiff's judgment against Sam G. Richardson in the prior civil action in the Superior Court for damages has not been satisfied in whole or in part.

The following conclusion of law is added to the conclusions of law heretofore signed and filed.

Conclusions of Law

V.

The insurance policy sued upon herein, covered and pertained to both of the judgments in favor of the plaintiff entered in Superior Court action 516890 referred to in the Findings. The liability of the defendant, Royal Indemnity Company, a

corporation, under the policy of insurance, was to pay to one person not exceeding Fifteen thousand dollars ($15,000.00) for bodily injury; and Five thousand dollars ($5,000.00) for property damage; together with interest and costs. That the plaintiff having recovered two judgments against two different parties growing out of the same accident, [190] is entitled to recover not more than Twenty thousand dollars ($20,000.00) together with interest and costs from the defendant, Royal Indemnity Company by reason of the insurance policy. That the liability of the defendant, Royal Indemnity Company to the plaintiff under said insurance policy has to the extent of the sum of Thirty-five hundred dollars ($3500.00) been partially discharged; that plaintiff, George N. Olmstead is entitled to judgment against defendant, Royal Indemnity Company, a corporation, in the sum of Sixteen thousand five hundred dollars ($16,500.00), together with said plaintiff's allowed costs of suit in the sum of Fourteen dollars ($14.00) in the civil action for damages in the Superior Court, together with interest on said judgment at the rate of seven per cent (7%) from September 12, 1946, to date of entry of judgment herein.

Judgment is hereby ordered to be entered accordingly.

Dated this 26th day of June, 1950.

/s/ JAMES M. CARTER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1950. [191]

District Court of the United States, Southern District of California, Central Division

No. 8729 C

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation, DOE COMPANY, a Corporation, ROE COMPANY, a Corporation,

Defendants.

JUDGMENT

A motion having been regularly made by the plaintiff above named, and the above cause coming on to be heard on said motion of plaintiff for summary judgment upon his amended complaint for the relief demanded in said amended complaint under Rule 56 of the Federal Rules of Civil Procedure that there is no genuine issue as to any material fact, upon the affidavits in support thereof, the answers to plaintiff's request for admissions, the answers to plaintiff's interrogatories, with due proof of service of said notice of motion and affidavits in support of said motion, and upon argument had in open court, and the court having given judgment in plaintiff's favor and against Royal Indemnity Company, a corporation, in the sum of Twenty Thousand Dollars ($20,000.00) together with court costs in the sum of Fourteen Dollars ($14.00), together with interest at the rate of seven per cent (7%) from September 12, 1946, to [193]

date of entry which said judgment was entered April 27, 1950, in Judgment Book No. 65, Page 465, and

The defendant, Royal Indemnity Company, a corporation, thereafter having brought on its motion for leave to file an amendment to its answer to plaintiff's amended complaint, a motion for new trial and to set aside the judgment, on May 15, 1950;

It Is Ordered, Adjudged and Decreed that said judgment for plaintiff and against said defendant be and the same is set aside, and that a new judgment in the sum of Sixteen Thousand Five Hundred Fourteen Dollars ($16,514.00) with interest thereon at seven per cent (7%) per annum from the 12th day of September, 1946, to the date hereof, making a total judgment of $20,879.45, be entered in favor of plaintiff, George N. Olmstead, and against Royal Indemnity Company, a corporation, together with costs of this action to be taxed by the clerk against Royal Indemnity Company, a corporation, for which plaintiff shall have execution.

Enter.

Dated this 26th day of June, 1950.

/s/ JAMES M. CARTER,
District Judge.

Judgment entered June 26, 1950. [194]

Memorandum (Rule 7(h) Local Rules, Southern District of California)

7% interest on $16,500.00 amounts to $1,155.00 per year or $96.25 per month, or $3.21 per day, or from September 12, 1946, to May 12, 1950, a period of three years eight months or $4,325.00 to May 12, 1950, and at the daily rate thereafter of $3.21 per day until the entry of this judgment.

Receipt of copy acknowledged.

[Endorsed]: Filed June 26, 1950. [195]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the defendant Royal Indemnity Company, a corporation, has filed, or is about to file, a notice of appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the judgment entered by the District Court of United States for the Southern District of California in the above-entitled cause on June 26, 1950, and to supersede said judgment; and

Whereas, the said defendant is required to give an undertaking, under seal, in the sum of $22,347.48, conditioned for the satisfaction of the judgment in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full any modification of the judgment and such costs, in-

terest, and damages as the appellate court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Globe Indemnity Company [197] a corporation, organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will comply with the conditions as above set forth, and does further agree that, upon default by the said Appellant in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

In Witness Whereof, the said Globe Indemnity Company, has caused these presents to be executed and its official seal attached by its duly authorized attorney in fact, at Los Angeles, California, this 30th day of June, 1950.

[Seal] GLOBE INDEMNITY COMPANY,

By /s/ ELMER E. FITZ,
Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ C. PAUL DuBOIS,
Attorney for Plaintiff.

I hereby approve the foregoing.

Dated this 5th day of July, 1950.

/s/ JAMES M. CARTER,
Judge.

State of California,
County of Los Angeles—ss.

On this 30th day of June in the year 1950, before me, L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appeared Elmer E. Fitz known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Globe Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as surety, and his own name as Attorney-in-Fact.

[Seal] /s/ L. HOLLINGSHEAD,
Notary Public in and for
Said County and State.

My Commission Expires May 14, 1952.

[Endorsed]: Filed July 5, 1950. [198]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Royal Indemnity Company, a corporation, hereby appeals to the Court of Appeals for the Ninth Circuit from:

The Final Judgment entered on June 26, 1950, in Judgment Book 66, at page 690.

Dated: June 30, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 7, 1950. [199]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant, Royal Indemnity Company, a corporation, and designates the entire record on appeal to include the following:

1. Amended Complaint for Money Due on Contract and Exhibit "A" attached thereto;

2. Answer to Amended Complaint;

3. Plaintiff's Motion to Strike Portions of Defendant's Answer to Amended Complaint and for Summary Judgment on the pleadings;

4. Affidavit of George N. Olmstead dated February 13, 1950;

5. Affidavit of Walter N. Hatch in support of Motion for Summary Judgment dated February 14, 1950;

6. Plaintiff's Interrogatories, dated March 10, 1950;

7. Defendant's Answers to Plaintiff's Interrogatories;

8. Plaintiff's Request for Admissions dated 2/15/50; [201]

9. Defendant's Answer to Plaintiff's Request for Admissions;

10. Defendant's Motion for Leave to File Amendment to Answer;

11. Defendant's proposed Amendment to Answer;

12. Affidavit of R. W. Clayton, dated May 4, 1950;

13. Affidavit of Hulen C. Callaway, dated May 4, 1950, together with copy of letter attached thereto;

14. Affidavit of Elizabeth E. Richardson, dated April 18, 1950;

15. Affidavit of Robert E. Dunne, dated May 3, 1950;

16. Affidavit of George E. Hosey, dated April 20, 1950;

17. Affidavit of Sam G. Richardson, dated April 10, 1950;

18. Counter-affidavit of C. Paul DuBois, together with exhibit attached thereto, dated May 10, 1950;

19. Counter-affidavit of Arthur P. Carter, dated May 9, 1950;

20. Findings of Fact and Conclusions of Law and all modifications thereto;

21. Motion for New Trial and to Set Aside Judgment;

22. Minute Order dated May 22, 1950;

23. Memorandum Decision, filed May 22, 1950;

24. Minute Order of June 26, 1950;

25. Judgment entered Book 66, Page 690;

26. All stenographic notes in the following proceedings;

(1) Hearing on Motion for Summary Judgment;

(2) Hearing on Motion for New Trial;

27. Notice of Appeal;

28. Defendant's Supersedeas Bond;

29. Designation of record on appeal;

30. Any designation of additional matter filed by plaintiff.

Dated this 13th day of July, 1950.

Respectfully submitted,

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 14, 1950. [202]

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF RECORD ON APPEAL

Comes Now the appellee, George N. Olmstead, and designates additional documents to the record on appeal to include the following:

1. Plaintiff's Motion to Strike Portions of Defendant's Answer to Amended Complaint, For Summary Judgment on the Pleadings dated February 15, 1950, and Plaintiff's Points and Authorities in support thereof commencing at page 17 thereof.

2. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for New Trial and all exhibits and affidavits annexed thereto, filed about May 10, 1950; together with Substituted Exhibit 3, filed about May 17, 1950.

3. Plaintiff's document entitled "Findings of Fact Supported By:" filed May 17, 1950.

4. Plaintiff's Statement of Uncontroverted Facts filed [204] February 15, 1950.

Dated this 21st day of July, 1950.

Respectfully submitted.

/s/ C. PAUL DuBOIS,
Attorney for George N. Olmstead.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 21, 1950. [205]

[Title of District Court and Cause.]

APPLICATION AND ORDER FOR EXTENSION OF TIME TO FILE THE RECORD AND DOCKET ON APPEAL

Comes Now the defendant-appellant Royal Indemnity Company, a corporation, through Tripp & Callaway, its attorneys, and requests an extension of time to file the record on appeal to September 29, 1950, for the following reasons:

Through error in the offices of Tripp & Callaway the reporter was not requested to prepare a transcript of the hearings on the motion for new trial and the motion for summary judgment until August 1, 1950, at which time it was learned that said reporter, namely Samuel Goldstein, will be on his vacation during the entire month of August and

will be unable to have the minutes transcribed until after that time.

Therefore it is respectfully requested that defendant-appellant have to and including September 29, 1950, within which to file the record on appeal herein.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

It Is So Ordered:

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed August 2, 1950. [207]

In the United States District Court Southern District of California Central Division

No. 8729-C Civil

GEORGE N. OLMSTEAD,

Plaintiff,

vs.

ROYAL INDEMNITY COMPANY, a Corporation, et al.,

Defendants.

Honorable James M. Carter, Judge Presiding

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Monday, April 3, 1950

Appearances:

For the Plaintiff:
C. PAUL DuBOIS, ESQ., and
HOWARD VELPMAN, ESQ.

For the Defendant Royal Indemnity Company:
TRIPP & CALLAWAY, by:
F. V. LOPARDO, ESQ.

Monday, April 3, 1950, 2:00 P.M.

The Court: I am sorry to be late, but I was looking over the file and I discovered it was probably a little more intricate than I thought it was. It took me a little longer to look it over than I thought it would.

Mr. DuBois: Plaintiff at this time moves to associate, for the purpose of this motion, and for this motion only, former co-counsel for and on behalf of plaintiff, Howard Velpman.

The Court: The motion will be granted.

Mr. Velpman: Counsel, your Honor, this is a motion to strike the affirmative defenses set up by the defendant, and a motion for summary judgment. The same law would affect both motions.

This is a case being brought by a judgment creditor who on April 9, 1946, in the 1200 block of San Gabriel Boulevard, Los Angeles County, had an accident. He was struck by an automobile driven by a man by the name of Richardson. Richardson had hired this car from a concern in the City of Pasadena by the name of Blodgett's Auto Service and Tours. I am going to refer to them as Blodgett's.

Blodgett's was conducting this business pursuant to a Pasadena ordinance, which is set forth in the points and authorities, and as part of that ordinance a certain policy [2*] of insurance was required to be carried by Blodgett's.

The defendant, I believe, in his answers to the interrogatories, or in the admissions, says that the City of Pasadena, the physical limits, stops at about the 600 block on San Gabriel Boulevard, so the accident did not happen, technically, in the physical limits of Pasadena.

The first premise on which we believe this motion should be granted is that the contract of insurance

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

in this case is a contract which is issued pursuant to this statute making the contract of insurance compulsory insurance, and on the basic proposition of compulsory insurance there are no defenses. The contract itself, as well as the statute, uses the word "guarantee."

Before I get into that, I forgot to mention the fact that the judgment creditor in the California state court obtained a judgment for $25,000.00 for personal injuries and $6,000.00 property damage. It is that judgment which is the basis of his cause of action here on the policy.

The guarantee provision of the policy, under its Purpose clause, says:

> "It is hereby understood and agreed that notwithstanding expressions inconsistent with or contrary thereto, in this policy or any endorsement thereto contained, this policy is specifically issued to cover passenger-carrying automobiles rented or [3] leased in the City of Pasadena, * * *."

There is no question but what this automobile was leased or rented in the City of Pasadena to Richardson.

The Court: What page are you reading from, of the policy?

Mr. Velpman: Page 6 of the moving party's reply memorandum. That is part of the language of the policy. Then it goes on to say:

> "or which the owner uses or allows or permits to be used as drive-ur-self vehicles on the

> streets in the City of Pasadena . . . . . and in the event that a final judgment for any loss or claim under this policy is rendered against the owner and/or driver of such automobile, the Insurer guarantees payment direct to the plaintiff securing such judgment . . . . . irrespective of the financial responsibility of the assured, and for the purpose of enforcing this guarantee, an action may be commenced and maintained against the Insurer by any such plaintiff."

That is the specific language of the policy itself.

To go a little further than the contract itself, we have a guarantee in the contract, now that part of the policy is an endorsement which was typewritten. The standard policy, of course, is in a printed form. We have cited law on page 20 of the reply memorandum to the effect that where a [4] typewritten portion is inconsistent with the printed portion, the typewritten portion will prevail.

That is stated because we say that this assuring clause guaranteeing the payment of a judgment is inconsistent with the requirement that the assured do certain things in the way of cooperation, et cetera; purely an inconsistency in the policy. We say this clause overcomes the other clause because of its being typewritten, being in the form of an endorsement.

We also say that this policy is in the form of a third-party beneficiary contract; that when this accident happened between Richardson, who is not the named but an additional assured under this policy,

that the rights of the judgment creditor at the moment the accident happened were set, and nothing that the assured under the policy could do at a later date in the way of lack of cooperation—of course we are only at this time assuming lack of cooperation for the purpose of this motion——

The Court: Before you go on to that point, let's go back to this endorsement. Is there a photostat of the policy or typewritten copies?

Mr. Velpman: Typewritten copies only.

The Court: Where is the clause that you say the endorsement varies? Which is the clause which would defeat you if it was not for the endorsement using the word "guarantee"?

Mr. Velpman: That would be in the clause pertaining to [5] conditions to be performed by the assured.

The Court: Will you point that out to me in this long policy?

Mr. Velpman: Yes.

The Court: It is probably beginning at page 5, "Conditions," I take it.

Mr. Velpman: No. It would be on page 19. Those are the ordinary conditions you find in any insurance policy, where an assured has got to give notice of an accident, cooperate with the insurance company, send in process papers, and that sort of thing.

The Court: I just wanted to read the particular paragraph and then read this endorsement. What particular paragraph? The one you refer to, be-

ginning at line 14, "Assistance and Cooperation"?

Mr. Velpman: That is correct.

That is their defense, that is the affirmative defense they have set up in this action. They are relying on the language of the policy in this defense.

The Court: I take it that Blodgett's, or someone acting in their behalf, gave notice to the company of this accident?

Mr. Velpman: That is correct, Blodgett's did give notice to the insurance company on the 12th of June, 1946, which was three months after the accident occurred, two months, and I have forgotten the number of months but several [6] months prior to the judgment being taken against Richardson.

The Court: Had Richardson's suit been filed? Does the record show when Richardson—when Olmstead, I mean, filed his suit?

Mr. Velpman: Yes. Olmstead filed his suit—there were two suits filed; one was dismissed—in June of '46, two months after the accident.

The Court: Now, where in the policy is this language on this typewritten endorsement which you referred to?

Mr. Velpman: The bottom of page 10 and the top of 11.

The Court: The policy was a printed policy and these conditions were the ordinary printed conditions on the policy?

Mr. Velpman: The cooperation part of the policy.

The Court: Then this endorsement is a typed endorsement?

Mr. Velpman: That's right, your Honor.

The Court: Do you attach particular significance to that word "guarantee"? Do you have cases that indicate that the word "guarantee" has a——

Mr. Velpman: Yes, I have one that would help and assist you in that.

Of course we don't concede that that is the only reason for recovery in this case. That is just one theory of plaintiff's motion. The guarantee provisions should prevail and make this an absolute liability.

Our other theory is that regardless of the defenses, the [7] fact that the policy is compulsory in itself, under a statute, makes it an absolute liability policy, and there are no personal defenses to the assured.

I might take up next the Kruger case, which we do rely on considerably. That is a California case. It is on page 20 of the plaintiff's opening memorandum.

The Court: I read most of that. That is one of the things that delayed me. That case would be on all fours outside of the fact that the accident didn't happen in Pasadena.

Mr. Velpman: That is the only distinction that I could see.

The Court: How do you argue that out? What is your view on that?

Mr. Velpman: That goes to the extraterritorial power of the City of Pasadena.

The Court: I notice the policy was charged to Blodgett's, that is, the premium, on the basis of

rental, and the gross rental of Blodgett's was supplied by driving both within the City of Pasadena and without the City of Pasadena. I take it the court could take judicial notice that a company engaged in the business of renting cars for drive-yourself propositions or sightseeing busses, or whatever types of vehicles were included within this policy, would not limit itself to activities within a certain municipality. Obviously it would be very difficult to limit a drive-yourself driver to city [8] limits. The premium is charged on the basis of gross rentals, which would include rentals in and out of the city. The city, referring to the language you referred to previously, bases part of its jurisdiction to require the policy on the fact that the rental occurred in the City of Pasadena. I have those distinctions in mind.

How do you spell this out? Does the Kruger case control, under your theory, or can you draw a distinction because of this accident happening elsewhere?

Mr. Velpman: The Kruger case controls under my theory, certainly, I believe that is the situation. But I am prepared to cite further law whereby other jurisdictions in a similar situation to this have given recovery to a judgment creditor in a case of this type.

The Court: Counsel, let me say right there that I will be very interested to read some of these cases, but in about the hour and fifteen minutes I spent going through this file, I saw that there are so many cases cited that if I had to read all these cases that

have been cited I wouldn't be able to decide any other cases around here for several months. Pick out the cases you want me to read, but I am not going to read all of those unless it becomes necessary.

Mr. Velpman: I have been prepared here to argue this thing very much at length, but I believe your Honor is grasping the nub of the case much quicker than I anticipated you [9] would, and I think we can get right down to this question you have in your mind of extraterritoriality, and I will go right down to that.

Of course the ordinance itself is part of the policy. This particular ordinance, of course, is under the police power of the State of California. The ordinance in no way limits the person who may recover because of an injury. It uses the expression "any person." So does the policy use the same language. The ordinance in no way draws any limitation on where that person would be when he becomes injured. There is no limitation on the physical limits at all, as far as where that automobile is going to operate. Neither does the policy have any limitation.

Now, the cases cited by the defendant are these Massachusetts cases, and in the Massachusetts cases you will find little statements why recovery was not given to the judgment creditor, and that was because, in each case, the court always found that where the accident happened in New Hampshire, rather than the State of Massachusetts, that it did not happen on the ways of the Commonwealth of

Massachusetts, therefore there was no recovery.

The Court: I noticed that in one case, it happened on private ground; but from a hurried reading of the briefs it looked as if possibly Massachusetts was a jurisdiction where the rule is contrary. Is it your contention that all those [10] cases can be explained on the basis of accidents not on the public ways of the Commonwealth?

Mr. Velpman: That's right, for this reason: In examining the statutory law, Annotated Laws of the State of Massachusetts, under chapter 90, section 34A, "Definitions," under a section of "Compulsory Motor Vehicle Liability Insurance," down here where it says "Motor vehicle liability policy," the language is this: ". . . and arising out of the ownership, operation, maintenance, control, or use upon the ways of the Commonwealth of such motor vehicle."

In other words, that insurance policy under this law has restricted the situation that it has to happen on the ways of the Commonwealth of Massachusetts. That is the reason the Massachusetts Supreme Court couldn't go beyond the physical jurisdictional limits of that state.

There is no such language as that in the ordinance involved in this litigation. The ordinance here is wide open.

Now, having that in mind as a distinction——

The Court: If that is the language of the Massachusetts policy, of course that would explain all those cases, because obviously even an accident in

the State of Massachusetts on private ground would not be on the highways of the State of Massachusetts.

Mr. Velpman: That is right, that would be a correct holding. [11]

The Court: Do you concede that is the language of that Massachusetts statute, Mr. Lopardo?

Mr. Lopardo: I will not concede anything of the sort, your Honor.

The Court: All right, all right. I just thought we would pass one thing at a time.

Mr. Velpman: I was reading for the moment there the statutes of Massachusetts themselves.

We have the case of Northwest Cab Company v. Central Mutual Insurance Company, a case that arose in Illinois. In this case——

The Court: Is this one you want me to read?

Mr. Velpman: This is one I would like your Honor to read.

The Court: Go ahead and read anything from it that you want to, but let me have the citation, because I will probably want to read it afterward.

Mr. Velpman: It is 266 Illinois Appellate at page 192, Northwest Cab Company v. Central Mutual Insurance Company.

The Court: You don't have a Pacific citation on that?

Mr. Velpman: I am sorry we didn't get it.

The Court: All right. I will try to find it.

Mr. Velpman: This is a case where the State of Illinois had a statute which says, in part, that "It is unlawful for any person," and so forth, "to oper-

ate any motor vehicle upon [12] any public street or highway in an incorporated city having a population of 100,000 or more''—in other words, it affected cites of 100,000 or more—"for the carrying of passengers for hire. . . ."

The plaintiff in this case was a woman who got injured in a cab, and there was a demurrer filed, and the demurring party alleged that the policy did not cover this accident because the accident did not occur in a city of 100,000 people or more.

Well, the court finds as a fact that actually it did occur in Chicago. At least, the lower court was upheld by the appellate court that there was enough of an inference that it did. But in explaining, the court, further in support of the judgment, asks this question:

> "Does the insurance policy cover accidents which occur outside of the city limits? Defendant says it does not''—and cites a Washington case—"where, in construing the statute of that state, it was held that the bond required as a condition to carrying on the business of transporting passengers for hire in a motor-propelled vehicle in any city of the first class, did not cover accidents happening beyond the city limits. However, we read the statute there considered as containing words limiting the accident covered to the confines of the city. There are no [13] such words of limitation in our statute." That is the point I was making a while ago. "Neither in the policy are there any words limiting the territorial liability of the

insurance company." There is not any in the policy.

"The policy provides, 'that the Central Mutual Insurance Company shall and will pay and satisfy all final judgments,'" and so forth.

The Court goes on to say:

"Words limiting its territorial liability could have easily been added to the policy had the defendant so desired. The statement that is issued pursuant to the provisions of the Motor Vehicle Law means that the insured is permitted to operate its cabs within the city limits. The policy must be construed most strongly against the company issuing it, and, in case of doubt, favorably to the assured—the public in this case."

Then the court goes on and cites another case in Louisiana, and cites another case in New Jersey. In New Jersey the policy and the statute spoke of "Port Newark." The accident did not happen in Port Newark, but happened in the State of New Jersey. There was coverage.

Then the court ends its argument by making this statement:

"Having in mind the purpose of the statute, which is to protect the passenger public, we hold that even if the accident in question happened outside the limits of the City of Chicago, defendant is liable on its policy."

That is exactly our position here, and I don't know how I can find any language any stronger. That is the State of Illinois speaking.

The case of Utilities Insurance Company v. Potter, which is cited in the reply memorandum on page 13 of our brief, is a case where a policy was issued in Oklahoma to cover a band, it was under a statute as in this case. The plaintiff was riding in this bus and he got injured in the State of Tennessee and in the State of Virginia. He obtained a judgment against the bus company and then later filed suit against the bus company's insurance carrier, and in that case the court says:

> "We * * * note * * * that the liability of the insurer is made coextensive with the liability of the assured, insofar as there is legal liability for damages resulting from the operation of such assured carrier * * * the general terms of the policy are applicable and include damage sustained within the territorial limits of the United States and Canada. The ultimate liability is not fixed by the provisions of the policy * * * where a liability [15] bond is filed as a prerequisite to the issuance of a license. Neither the insurer nor the assured may successfully contend that the bond limits the liability imposed * * *; * * * we find * * * liability to be coextensive with the liability of the Assured for damages resulting from the operation of any such Assured."

That isn't what I had in mind.

> "The interest of the law is to put financial responsibility behind the operator of a motor transportation company as a protection to the people. There is nothing in the language of

> either which purports to limit the liability of the damages incurred only within the boundaries of this State. The insurer would have us construe such language into the law. This we cannot do."

If your Honor will read that case in support of our proposition.

Your Honor may question whether or not the City of Pasadena has any legal power to affect somebody who is injured five feet over the border line, say. We have cited many cases here in the brief whereby various municipalities and various states, including this one, can exercise extraterritorial powers where it is incidental to carrying on something that is to be controlled within the city itself. [16]

I am not going to try to cite all those cases, because they raise different facts. But the case of Ebrite v. Crawford, which we have in our brief, at 215 Cal. 724, is a case——

The Court: Ebrite?

Mr. Velpman: Ebrite, E-b-r-i-t-e, v. Crawford.

The Court: On what page of your brief is that, do you remember?

Mr. DuBois: Page 12, your Honor, about the center of the page, under "Airports."

The Court: All right.

Mr. Velpman: In this case two airplanes collided down near the City of Long Beach near the Long Beach Airport. The actual collision did not occur over the City of Long Beach property. Instructions were given to the jury of a certain ordinance regu-

lating air travel arising out of that airport. The appellant claimed that there was an error in giving this instruction covering this ordinance because, as I say, the accident did not happen within the physical limits of the City of Long Beach. However, the court says:

> "The appellant replies to this contention that the accident occurred outside the city limits of Long Beach * * *. This argument of appellant cannot be sustained for the reason that the City of Long Beach had extraterritorial power necessary to [17] regulate and lay down rules governing the use of the municipally owned airport, lying partly within and partly without the city. By act of the legislature approved," and so forth and so on.

The Court: Did the City of Long Beach there have certain powers over the portions of the airport that lie outside of the city by virtue of some state statute?

Mr. Velpman: Yes, that's right. That is correct, your Honor. Then it goes on to say:

> "In addition to the implication that necessarily flows from the quoted language of the statute it should be observed, as is said by the Supreme Court In re Blois"—a California case: "'* * * Municipalities may exercise certain extraterritorial powers when the posssession and exercise of such powers are essential to the proper conduct of the affairs of the municipality.'"

The power of Pasadena comes from the constitu-

tion, it comes from the power given in the Vehicle Code. Section 459 of the Vehicle Code says:

> "The provisions of this division shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters: [18]
>
> "(b) Licensing and regulating the operation of vehicles for hire."

The Court: Well, that answers one inquiry I had in mind, that is, where the State has preempted a certain field, as, for instance, in the passage of a motor vehicle code. Ordinarily, except for some exception of that sort, a local municipality has no power to legislate in that particular field.

Mr. Velpman: In this case we have the actual regulation of the City of Pasadena attaching while that vehicle is in the City of Pasadena. It is an incidental of that regulation if that vehicle gets outside the city and strikes someone. Are we saying that because——

The Court: It seems to me the problem boils down to this: The City of Pasadena—I am just thinking out loud now, this isn't a decision in the matter, as I haven't heard from the other side—the City of Pasadena certainly has a right under its police power to regulate a business and to grant permits to a business operating within the city. Pursuant to that ordinance Blodgett's take out a policy of insurance and comply with the statute and get a permit to do business. In that sense it is

a statutory policy. It is a policy which they gave because they were required to give it in order to get a permit to do business. Had the accident happened within the City of Pasadena there would have [19] been no argument. Now, the accident happens outside of the city. The contract that is entered into is a voluntary contract.

Mr. Velpman: That is right.

The Court: There is no statute that says anybody has to make the contract. It merely said, if you want to do business in Pasadena and get a permit to do the business, you have to have one of these contracts.

So Blodgett's go out and get the contract from the insurance company.

You therefore have a meeting of minds between the insurance company and Blodgett's where they enter into a certain agreement, aside from the fact that the agreement was a necessary prerequisite for Blodgett's to get a permit to do business.

Now, is that situation changed any when a person is injured outside of Pasadena, rather than in Pasadena? How has the contract between the insurance carrier and Blodgett's been altered any by the happening of the accident outside of Pasadena, unless, of course, the insurance carrier wanted to put a clause in there? That might have been done.

Mr. Velpman: Limiting its coverage?

The Court: Yes.

Mr. Velpman: Which is the same thing that the Illinois case says they could have done. That is what the Oklahoma [20] case suggests.

They don't do that. They went way beyond the policy, as a matter of fact. They elected to write the risk.

If your Honor please, I could further comment upon the defenses themselves set up as not sufficient defenses, but Mr. DuBois will make a short statement on that in rebuttal to the defendant's opening statement.

Unless there are some other questions your Honor would like to ask me, I will retire at this moment.

The Court: Well, one of the defenses set up is that the insurance company had no notice.

Mr. Velpman: They have admitted notice.

The Court: They had no notice from Richardson. They admit they received notice, I thought it was June 27, 1946, from Blodgett's; is that right?

Mr. Lopardo: As to Blodgett's.

Mr. DuBois: On the interrogatories, No. 15 on page 4, they admit notice June 12, 1946.

The Court: Let's hear from the other side. I will probably call on you gentlemen again.

Mr. Lopardo: Your Honor, before I get into this I think perhaps I should bring up one point so that we can have it in most of our minds here before we get too far away.

This is an action for summary judgment, and the only thing we have to decide here is this: Is there a question of fact? [21]

We don't care about the merits of this case at all. Whether the court is going to rule one way or another, come trial that is one thing. Is there a question of fact, and that is the only thing that counts.

The Court: Of course this is a motion for summary judgment. We also have a pretrial on. So actually this is part of the pretrial where you gentlemen are advising me about the issues of this case. However, we can go more fully into the pretrial subsequent to this motion. But there are two matters on the calendar.

Mr. Lopardo: My impression, your Honor, from the clerk, I think, and from the court, when I discussed this over the phone, was that the motions would be heard first, and then after the motions we would go into the pretrial.

The Court: Well, that is all right.

Mr. Lopardo: The reason I would like to bring that up is because that is the big point. The court seems to be quizzical, in doubt and so are we, if there is a question of fact in this case, or several questions.

The Court: They have two motions on, one to strike certain paragraphs of your answer, and one for summary judgment. If thse portions of your answer are stricken, and they all seem to be of the same breadth of allegations, are there still issues of fact in the case, and, if so, what? [22]

Mr. Lopardo: There would be the question of damages, the question of whether or not an accident ever occurred.

I would like to bring up a case, as the court said, on all fours in New Jersey, Merchants Indemnity Corporation of New York v. Peterson, which I just

found the other day, so it is not in my memorandum. It is 113 Fed. 2d, page 4.

The Court: Merchants Indemnity?

Mr. Lopardo: Merchants Indemnity Corporation of New York v. Peterson, 113 Fed. 2d, page 4.

That was a case where a lower court granted a summary judgment in a case just like this. There was supposedly a required insurance policy under the state law of New Jersey. A judgment was rendered against the assured, who didn't pay, then the plaintiff sued the insurance company. The assured didn't pay and the company didn't pay, so the plaintiff sued the insurance company. On a similar objection to this the lower court granted a motion to strike the very defenses which we are bringing up right here, lack of cooperation and lack of notice, et cetera; it granted that motion and granted a motion for summary judgment, and the circuit court reversed it on this ground: One, the insurance company in that case denied on information and belief as we did, that an accident ever occurred.

Remember, there had been a judgment granted. But still the court said that was a question of fact and it was for [23] trial, not for summary judgment.

That is No. 1. No. 2, plaintiffs in that case alleged there was a compulsory policy. The defendants denied it. So did we. We deny that is a compulsory policy. And the court said that is a question of fact.

The Court: According to one of the memoranda, they claim you didn't deny that. They claim you admit it is a compulsory policy, at least in the sense that you didn't deny it.

Is that right?

Mr. Du Bois: That is right.

Mr. Lopardo: That is what they allege. I am not saying it is correct.

The Court: You know what your pleadings contain. Did you or did you not?

Mr. Lopardo: We did not admit that this is a compulsory policy, and I will set forth the reasons later on, one of them being they never alleged where the accident occurred, they never alleged that the accident occurred within the jurisdiction of the policy, therefore we never admitted it at any time.

Furthermore, on closer examination, they never alleged that this particular policy was ever issued because of the policy which would be the only policy——

The Court: Wait a minute. Say that over again. Either [24] you lost it or I did.

Mr. Lopardo: There is a difference between issuing a policy pursuant to a statute, and that policy being the only policy which was required by the statute. Here is why I bring that up. In this very case, the Peterson case, it brings this point up: It does not appear from the pleadings or from anything contained in the record that the policy is one required by statute. For example, some other and earlier policy may have been the one.

Suppose this Blodgett's had taken out another policy with another company, they just wanted more insurance, and they said, "We want some more insurance pursuant to the ordinance here."

The Court: Is it your contention that plaintiff

has not alleged that this was the policy taken out pursuant to that ordinance?

Mr. Lopardo: Well, looking at this complaint——

The Court: They have got enough paragraphs in that complaint. If they didn't allege that, they wasted a lot of space.

Mr. Lopardo: I will read the language to the court on that.

Mr. DuBois: Page 3 of the amended complaint, about half way through, roman numeral paragraph VII.

The Court: Beginning line 19 it says: "That a written [25] insurance contract, such as hereinafter referred to as Exhibit A, issued by Royal Indemnity Company and dated February 16, 1946, was required by said ordinance, and was applied for because of and issued pursuant to, under and in accordance with said ordinance, and said ordinance was, at all times mentioned herein, a part of the terms, covenants and agreements of said insurance contract. That said contract, Exhibit A, was caused to be filed with the City of Pasadena. That the said City issued a municipal permit * * *."

It is a kind of long way around, but don't you think that is what they have alleged?

Mr. Lopardo: Technically, no. Here is why. They say "one such as." Well, did they have another one? Did they have——

The Court: The case isn't going to turn on technicalities of pleading of that sort. I don't think it is as concise a statement as might be drawn, but I

think it is clear that what they mean is that a written contract, to wit, Exhibit A attached hereto, was issued by Royal Indemnity under and as required by said ordinance. That is what they mean.

Mr. Lopardo: Well, your Honor, it is our contention, of course, that a summary judgment is far and away the most technical device available to either party, and it is so technical that when a moving party makes that motion all of [26] the presumptions are against that party as far as questions of fact are concerned, and all we have to have is a question of fact.

As I brought out before, we are not to determine the case on its merits at this time, but to determine whether there is a question of fact, and that is all.

The Court: What questions of fact are still in the case, should the motion to strike those paragraphs be granted? One is this one you just raised, page 3, paragraph VII, as to whether this is the policy or there might be some other policy, and so forth. Is that one question of fact?

Mr. Lopardo: That is one question of fact, your Honor. Another question is whether or not the accident occurred.

The Court: Whether this particular accident occurred?

Mr. Lopardo: Yes. Another question of fact is whether or not this is a compulsory policy. And, your Honor, if that is a question of fact, and it is as this Peterson case holds, it is a Circuit Court case, if that is a question of fact then the defenses which this plaintiff wants to strike resolve that question.

The Court: How can the question whether this is a compulsory policy, or not, be a question of fact? Isn't that a question of law?

Mr. Lopardo: I wouldn't think so, your Honor. There is the question of whether or not this was the only policy that [27] was taken out. I don't know whether or not Blodgett's took out other policies. And there are others in connection therewith that I am not in position to enumerate right now, and, as I say, all I have is this authority from the Circuit Court, Third Circuit, that says it is a question of fact.

Your Honor, I just wanted to bring that up because I didn't want to lose sight of the fact that on this motion for summary judgment the only thing that there is to be determined is if there is a material question of fact, and the case is not supposed to be determined on its merits.

The Court: Was this motion for summary judgment made, also, on the basis of the admissions in the file, replies——

Mr. Velpman: Yes, it takes those into consideration.

The Court: Is that so stated in your motion?

Mr. Velpman: Yes, I believe it is. I want to check that for certainty.

Mr. Lopardo: I don't think it is, your Honor, for several reasons. In the first place, the time for answering the admissions had been extended by counsel beyond the date that this motion for summary judgment was made, and it is my understanding that defendants still have time to answer those.

The Court: Well, it doesn't appear, unless it should appear indirectly from a reading of the statement of the [28] alleged uncontroverted facts.

Mr. Velpman: If your Honor please, we could file an amendment, if your Honor will permit us to, to make the admissions part of the record.

The Clerk: I believe it is provided for under the rule, your Honor.

Mr. Lopardo: It is our understanding that the defendants still have an opportunity to answer those admissions, because Mr. Callaway informed me last week, before he was called out of town, that he still had an opportunity to answer those admissions.

Mr. Velpman: They were served in February, and they have 10 days under the court rules to answer the admissions.

The Court: There is an answer to plaintiff's interrogatories. Now, are we talking about two different things? The answers to plaintiff's interrogatories are on file.

Mr. Velpman: They are deemed admitted if they are not answered in 10 days.

Mr. Lopardo: We can get an affidavit from Mr. Callaway when he returns that Mr. Du Bois personally gave him an extension of time to answer these admissions, and in substance words to the effect, "You can have as much time as you need in this particular."

Mr. Du Bois: Let me clear up the record. I don't want to embarass Mr. Callaway or counsel. It happense that prior [29] to the war I was employed in the same office, and we are friends. I do want

to point out that in this particular matter the request for admissions was served and filed on February 15, 1950; the interrogatories were served and filed March 10, 1950. It is true that Mr. Callaway called about the eighth or tenth or twelfth day after the service of the request for admissions and said, in substance, "I haven't got time to get them out, but I will have them out within a couple of days, is that all right?" And I said, "Why, sure."

I don't know what to say. It was not my thought that the matter for the admissions to be answered would be subsequent to our hearing. I certainly wasn't going to cut counsel off short if he was rushed. I think with the shoe on the other foot now, they are trying to take advantage of liberality. We never discussed the matter further. Even counsel said he would have his answers to the request for admissions in within a few days.

This is, I believe, April 3rd. I have asked this counsel, Mr. Lopardo, about that matter a number of times. I have talked to Mr. Callaway about it. There was only one request for more time, at which time it was my understanding Mr. Callaway said "a few days, and we will have our points and authorities in a few days after that, reply points and authorities and pretrial memorandum."

Mr. Lopardo: Your Honor, I cannot amplify my statement [30] any further. I said that Mr. Callaway informed me that he discussed this matter with Mr. Du Bois and that he was told that he had time. When Mr. Callaway comes back, if the court desires we will have him discuss this matter with Mr. Du

Bois and the court and settle it, or we will have him submit an affidavit. But I cannot speak any further on it except to the effect that he told me he had time and he was not under the belief that the request for admissions was admitted as of this date.

The Court: Certain affidavits were filed with plaintiff's motion for summary judgment. Have there been any counter-affidavits filed?

Mr. Lopardo: No, your Honor.

Mr. Du Bois: None have been served, your Honor.

The Court: Then you don't contest the contents of those affidavits, I take it?

Mr. Lopardo: Your Honor, we have no—I want to go ahead further with the merits——

The Court: I will let you go ahead, but I want to find out about this first.

Mr. Lopardo: We have no information or belief on which to oppose those affidavits, your Honor.

For example, how do I know that they have an affidavit from a policeman who says that he talked to this man Richardson, the man lived there? We didn't know where [31] Richardson was. Right now he is in the pen, we found out the other day. We got a letter here dated March 14th: "This will acknowledge your letter that Sam Richardson is an inmate here. Folsom."

We couldn't get an affidavit in opposition to these people, whether or not he lived there. That is ridiculous.

The Court: What I am thinking about is this: You say other questions of fact remain, one of them

being, did the accident ever occur? Well, there is an affidavit as part of their motion in which some sergeant or deputy of the Sheriff's office, I believe, or maybe it was the Police Department of San Gabriel, went down and investigated this accident, found the plaintiff injured there on the highway, and a fellow by the name of Richardson——

Mr. Lopardo: Your Honor, if that very policeman were called here at the trial and put on the stand and asked about his police report or what occurred, an objection on the ground of hearsay would have to be sustained, on the ground that he wasn't there, that all he knew was what someone told him.

If that would not be admissible at the time of trial, how can these people expect to depend on an affidavit?

The Court: Even if the policeman's testimony was inadmissible, certainly the record of the Police Department would be admissible. [32]

Mr. Lopardo: I don't know why. It would be a hearsay report. That is even more dangerous. A police report is what? A statement taken after the accident, not under oath, not subject to cross-examination, not in the presence of counsel. I don't see how that possibly could be introduced. It can't be, as a matter of fact. I am pretty sure the rules of evidence are conclusive to the effect that a police report cannot be, your Honor. I just don't see how this affidavit can do more than a policeman can, and he can't testify to it. Neither can the police report

be admitted in evidence. I don't see how these affidavits show anything.

I can show that one of their affidavits apparently must be erroneous. They say service was at 804 South San Gabriel, and if you go over and look at 804 it is a nursery where they raise flowers. And unless Sam was standing in the middle of the nursery, I don't know how they could have served him. I know that. And that is talking about judicial notice.

The Court: I noticed the discrepancy in addresses. One affidavit says he resided at 836, and the affidavit of service shows he was served at 804. There was also some indication that he was operating a service station during some of this period of time. I thought possibly 804 might have been the service station.

Mr. Lopardo: No; it is a nursery run by a Japanese. [33] And unless he was standing in the middle of the flowers——

The Court: He might have been picking a posy.

Mr. Lopardo: That is right, he might have been acting like a pansy.

I would like to go on with the merits here, if I may, your Honor.

The Court: All right.

Mr. Lopardo: First, of course, on the point, is there an issue of fact? We contend there is, and we have the Circuit Court case, which of course is determinative, since this is a District Court and that is a Circuit Court decision, and there is none to the contrary in this circuit.

No. 1, going on merits, plaintiff contends that their big nut is the ordinance, and I would like very much to read the ordinance to show that it does not say what they say it says. Here it is. It is in their memorandum someplace. I would like to read the first section, Section 1, subdivision (h), which defines a drive-yourself vehicle, and that is what is involved here:

> "A motor-propelled passenger vehicle or truck, other than the vehicles defined in this section, which is operated or used in the City of Pasadena, and which the owner for a consideration rents * * *."

In other words, in order to be a drive-yourself vehicle within this ordinance two things have to be satisfied: one, [34] the particular vehicle has to be rented; and, two, it has to be driven on the city streets of Pasadena.

That is within the definition of this ordinance.

The Court: Is the ordinance in toto set forth anywhere in these pleadings?

Mr. Lopardo: I think it may have been by the plaintiff here somewhere. Let me look in his moving memorandum. I think he quotes it.

Mr. Velpman: Yes, in the opening memorandum.

Mr. Du Bois: It is in the opening memorandum of plaintiff, commencing on page 17 of the points and authorities, but not in completeness. It only excerpts that portion of the ordinance that pertains to you-drive vehicles.

Mr. Lopardo: Let's read it, then. The last para-

graph on page 17, it is the same thing I just read, definition of a drive-yourself vehicle:

> "A motor-propelled passenger vehicle or truck, other than the vehicles defined in this section, which is operated or used in the City of Pasadena,——"

operated or used in the City of Pasadena——

> "and which the owner for a consideration rents or leases * * *."

Again I say two points in order to be a drive-yourself vehicle here: one, it has to be rented in the city; and, two, it has to be driven on the city streets. [35]

The Court: That would mean any trip it took would have to originate in the City of Pasadena. But you contend that it would be a drive-yourself vehicle while it was within the Pasadena city limits and it would cease to be a drive-yourself vehicle when it left the city limits?

Mr. Lopardo: That is a distinction, your Honor, I am going to bring up further. But I will just enter it now, and that is this: It isn't a question of is it a drive-yourself vehicle when it leaves the city, or is there insurance when it leaves the city? Oh, no. The question is, is it a drive-yourself vehicle covered by this ordinance when it leaves the city, is the insurance required by this ordinance when the vehicle leaves the city?

The Court: There is no dispute that this vehicle belonged to Blodgett's, was rented by Blodgett's, and left Blodgett's place of business in Pasadena.

Mr. Lopardo: All right.

The Court: Wouldn't it be stipulated that it had to, therefore, travel on some highway over the City of Pasadena before it could get to the place where the accident occurred?

Mr. Lopardo: Yes, but I don't quite understand the materiality of such a stipulation, your Honor, for this reason: The question is this, not is this a drive-yourself vehicle, not is this vehicle covered by insurance, but is it a drive-yourself vehicle covered by this statute, No. 1; [36] and, No. 2, is this insurance compulsory once it leaves the city?

Now, there is a difference. We won't say that this policy could not be voluntary insurance as to vehicles outside of the city. That is one question. The question is, is it compulsory? If it is voluntary, sure there is coverage, your Honor.

The Court: Why couldn't the insurance carrier have put in a clause of that sort if that is what it had in mind? And if it would have suggested that sort of limitation, undoubtedly the City of Pasadena would have refused to accept the policy, because the City would say, "We are figuring our rate for this on the gross receipts this man makes in his business, his business is located in the city, any trip would have to originate in the city, but obviously he may go outside the city; we are getting our revenue on his gross receipts; therefore, if you want this man to have a permit and do business with him, write him a policy, you will have to provide that your liability will cover not only in the city but also outside the city limits."

That is, in substance, what the policy says, because it didn't have any express exclusion.

Mr. Lopardo: Your Honor, the type of ordinance that has been put forth by this court, defendants will show is an unconstitutional ordinance, and it is a California case, not [37] an Illinois case or Oklahoma case. It is a California case, and it is cited in our reply memorandum.

Mr. Du Bois: Where is that case, counsel?

Mr. Lopardo: I think it is the Sackett case. Don't worry, I will get to it.

That is a case where they tried to regulate the street cars running between Pasadena and the City of Los Angeles.

If they can't do it, why can they regulate the cars?

You can't do it.

These cases that we are going to rely on, showing the extraterritorial requirements are unconstitutional, are California cases.

I would like to go on and finish the ordinance.

The Court: Go ahead.

Mr. Lopardo: Another thing to show that the ordinance intended only to cover the vehicles within the city, besides section 1, subsection (h), is section 2:

> "It shall be unlawful for any person, firm, association, or corporation to operate or cause to be operated at any point in the City of Pasadena any taxicab, for-hire automobile," et cetera.

Not any vehicle between the City of Pasadena and some other city. It is obvious, your Honor, it

seems to us, that this ordinance is intended to cover the vehicles on the city streets, the city streets which are used by the public of [38] Pasadena, not outside.

The Court: Wouldn't it be just as obvious that it was the intention of Pasadena to protect people who did business with concerns engaged in business in Pasadena?

Let's take a sightseeing bus, doesn't this same ordinance cover a sightseeing business?

Mr. Lopardo: I don't know, your Honor. I haven't read it with that in mind. It says "over the streets," but, again, "streets of Pasadena."

The Court: "For-hire automobiles or sightseeing automobiles." All right. Let's assume, therefore, that a citizen comes to Pasadena and goes down and takes a ride in a sightseeing bus, the company is doing business in the City of Pasadena, he goes down and buys a ticket at the hotel, the sightseeing bus takes him outside the City of Pasadena, and while he is outside the City of Pasadena he his hurt; wouldn't Pasadena have an interest to see to it that companies doing business in Pasadena, who recruited their passengers in Pasadena, who started their sightseeing trips in Pasadena, and ended them in Pasadena, protected those passengers even when they were outside of the City of Pasadena?

Mr. Lopardo: Your Honor, I think that it is beginning to exceed its powers under Article XI of the Constitution when they start doing that. Of course, all we can do—— [39]

The Court: Here is what the City of Pasadena does in the last analysis. The City of Pasadena

says, "We haven't got any control over what you do outside of the City of Pasadena; if you want to put up your stand outside of Pasadena, down at San Gabriel, keep your cars off of our streets, don't do business in our town, we have no control over you at all; but if you want to do business in our city and get a permit from us to do business, which would mean recruit your passengers, start your trips, and so forth, then you have got to put up certain insurance in which you guarantee to protect these people."

The person, therefore, who attempts to secure the insurance has the alternative to either put it up or not put it up. So he goes to an insurance company and says, "I need this kind of policy." The insurance company, therefore, contracts with Blodgett's, it is a matter of contract.

Mr. Lopardo: Voluntary contract.

The Court: Surely it is a voluntary contract, whether it is required under a statute or not required under a statute. You couldn't club the insurance company into putting up the insurance unless they wanted to.

So they entered a voluntary contract with Blodgett's. It is true that the compelling reason that caused Blodgett's and the insurance company to get together and enter into the policy was the fact that there was an ordinance in the City of [40] Pasadena. But that doesn't answer the rest of the inquiry, namely, isn't that insurance, voluntarily entered into between the company and Blodgett's, as effective outside of Pasadena as it was inside of Pasadena?

Mr. Lopardo: Our contention is, of course, it would be what is called voluntary coverage as opposed to compulsory coverage.

Since the plaintiff's two memoranda are replete with decisions, the court has asked that certain ones be pointed out for reading. Now, the defendant has only a few of them, and we would like the court to read all of them, in particular the Massachusetts cases, because we don't have many.

I will bet all in all we don't have more than ten cases.

The Massachusetts cases clearly make a distinction. In other words, the state statute there requires compulsory insurance, it is really the father of compulsory insurance contracts, that state law is, and it says that this insurance is going to cover all vehicles in certain places, just as this ordinance says this is going to cover all vehicles in certain places.

Now, the minute that a vehicle gets beyond the territorial jurisdiction of the State of Massachusetts or the City of Pasadena, the insurance is still in force, but it is considered voluntary insurance, it ceases to be compulsory insurance. In short, take the Massachusetts cases, a [41] compulsory policy is issued, the man on his way to New Hampshire, while he is in the state it is compulsory. An insurance company doesn't have to insure these people, but they do, they do it voluntarily, while that vehicle is within the confines of Massachusetts within the territory defined by the statute, it is compulsory, but the minute they go across that border there is still insurance, that is right, but it is voluntary in-

surance, and there is a difference as to liability if it is within the border and it is called compulsory, and the other.

The Court: What is this difference that you rely upon? The conditions requiring cooperation?

Mr. Lopardo: That is right. The Kruger case, which they cite, shows if it is a compulsory policy——

The Court: I follow your argument up to the "therefore." See if I can follow you on the "therefore." You say if so and so, now, therefore.

Mr. Lopardo: Therefore, if the policy—or if the accident, rather, occurs within that territory where the policy is still compulsory, the the liability is fixed in one manner. In other words, certain defenses aren't available. But the minute——

The Court: Is there anything in the policy that says that?

Mr. Lopardo: There is nothing in the policy except this, [42] your Honor, that there are certain conditions, and I am going to show that the particular endorsement which they claim is attached hereto —and it is—does not waive those conditions, those conditions are still in effect, they are still in force.

The Court: This typewritten endorsement that you are talking about, doesn't it apply, and isn't it a part of the policy whether the accident happened in the City of Pasadena or outside of the City of Pasadena?

Mr. Lopardo: Within the city it could be considered to be compulsory, but outside of the city the insurance would cease to be compulsory and be voluntary.

The Court: It is the same endorsement.

Mr. Lopardo: Same endorsement, and all I can do is cite the cases which show your Honor that that same one insurance policy which is compulsory within the territorial jurisdiction of the governing body becomes voluntary when it is outside of the territorial jurisdiction of that governing body, your Honor.

The Court: Do you have a case which states what the difference is between a voluntary and a compulsory policy?

Mr. Lopardo: Yes, your Honor, I think the Hynding case which we cite in my brief on page 6. The citation is Hynding v. Home Accident Insurance Co., 214 Cal. 743.

Now, that case goes into a pretty extensive discussion [43] of compulsory insurance and required insurance, and it also discusses Justice Cardozo's decision in the very important case in New York, the Amsterdam case, where the Justice made the distinction between compulsory policies and voluntary policies.

As I say, it is not a new point that the coverage within the state or the city is compulsory but outside of the state it is not.

The Court: Show me where I am wrong in this. There is no law that says that you have to issue a policy.

Mr. Lopardo: That's right, your Honor.

The Court: What is the name of this company that did business at the Green Hotel, the for-hire outfit in this case?

Mr. Lopardo: Blodgett's?

The Court: Yes. Blodgett's come to you and want you to write a policy, you write a policy, that is a voluntary contract between you and Blodgett's.

Mr. Lopardo: That's right, your Honor.

The Court: Why should there be one interpretation placed on it if the accident happened in Pasadena and another if it happens outside?

Mr. Lopardo: I don't know, your Honor.

The Court: Does that sound logical to you?

Mr. Lopardo: Yes, it does, your Honor, and here is why: [44] Each municipality or each state governing body cannot take upon itself the right to say what the duties, rights, or liabilities of someone outside of that city, in an accident, are going to be. If that be true, let's suppose that Blodgett's runs a rent outfit in Pasadena, and one in Los Angeles, actually what would happen is you would have—say Los Angeles had the same ordinance that Pasadena had, and this accident occurred outside of the city between two different outfits, how are you going to determine the liability that is going to attach to the parties? How far is this city's jurisdiction going? Does Los Angeles' jurisdiction go all the way to Pasadena. Does Pasadena's go all the way to Los Angeles? Does San Francisco come all the way down to Los Angeles?

The Court: That argument leaves me cold. If this were a misdemeanor, it is true there would have to be jurisdiction here. The misdemeanor would have to be committed within the jurisdiction of the particular municipality. But all the City of Pasa-

dena has done is, it said, "Look, do you want to do business, have a stand here, get passengers out of Pasadena and run busses? You have to carry a certain kind of insurance." And they said to Blodgett's, "We don't care whether you carry it or not." Blodgett's comes to you and gets the insurance. Why should there be one rule of construction in Pasadena and one rule outside? It is true that Pasadena [45] is benefiting a passenger who might get hurt outside of Pasadena, as well as inside of Pasadena, but this jurisdiction argument logically leaves me cold. What difference does it make? Pasadena has said, "If you are going to do a certain kind of business in our city you have to have a certain kind of contract;" and he gets that kind of contract. Now, the insurance company comes in and says, "All right, we construe that in Pasadena, but insofar as anybody that got hurt outside of Pasadena, we want to put a different construction on that."

Mr. Lopardo: Such a construction doesn't necessarily follow after the accident, but before. Here is another reason favoring the difference between compulsory and voluntary, and that is this: An insurance company might be very willing to write a compulsory policy within the city, because they know in a city there are certain requirements, such as licenses for driving on the street, certain police regulations, certain safety devices are needed, the streets are kept a certain way, the risk maybe is less, whereas outside of the city the risk is a little different, therefore an insurance company writing a policy might be very willing to say, "Yes, we will write a policy which will be compulsory within the

city, because we know the risks there, we are familiar with the police, we are familiar with the streets, we are familiar with the traffic regulations, we are familiar [46] with the safety regulations, so we are willing to write a compulsory policy for that city; but we are not willing to write a compulsory policy for every vehicle that is rented outside the City of Pasadena. It may be rented in Pasadena and driven out on the Muroc Desert, so you can't make us suffer compulsory liability for vehicles outside of the city, we didn't bargain that way."

The Court: Well, the insurance carrier can insert a clause, as they did in Massachusetts under the statute, they can say "if driven on a highway." That would remove Muroc Desert. If someone wanted to take his car on the desert and smash it up, he would be excluded.

Mr. Lopardo: The ordinance says that: —used in the City of Pasadena and which the owner rents.—to be used on the city streets of Pasadena.

The Court: Counsel, if your case rested on that, I don't interpret that section to be an answer.

I think to start with, the vehicle has to be used in Pasadena, or the business has to be conducted there, or Pasadena has no jurisdiction to require the contract.

Mr. Lopardo: Your Honor, may I quote, then, from these few Massachusetts cases?

The Court: Yes.

Mr. Lopardo: The case of Sheldon v. Bennett, 184 NE 722, page 5 of the defendants' answering memorandum, is as follows: [47]

> "The plaintiffs contend that the company should be held to have intended to give the assured the same coverage in New Hampshire which he had in Massachusetts; that if the accident had happened in Massachusetts the company was obliged to pay any person when injured up to the limits of the policy, regardless of any default on the part of the assured . . . . the fact that the policy which Samuel T. Bennett had was compulsory in Massachusetts did not by the extraterritorial indorsement continue the policy as a required or compulsory policy in the State of New Hampshire."

And that is even stronger, because the State of New Hampshire also has a compulsory statute.

An insurance company is willing to write a policy, all right, because they feel it is only compulsory within the city, not outside of it.

Your Honor we have only three or four Massachusetts cases and we would like to call those to the attention of the court. Of course the court has already seen the distinction between the Kruger case and this, and that is in that case the accident occurred, obviously, within the territorial jurisdiction of the city, and not outside.

The Court: The reporter has been going pretty steadily here, and you have further argument. We will take a short recess and then you may continue with your argument. [48]

Mr. Du Bois: How long will your Honor be agreeable to working today?

The Court: I will keep on. It is the only thing I have on this afternoon. Why?

Mr. Du Bois: We are willing to work as long as you are, Judge.

The Court: If this case is going to be tried, what date is the trial date?

Mr. Du Bois: May 16th.

The Court: If this case is going to be tried May 16th, we have a lot to do before we can go to trial on it, so we will probably have to spend another hour, hour and a half, on this matter.

Mr. Du Bois: Thank you.

(A recess was taken.)

The Court: Proceed.

Mr. Lopardo: Your Honor, plaintiff brought up the endorsement, No. 60253, which purports to cause this policy to be issued pursuant to the ordinance, and the said first paragraph reads: "It is hereby understood and agreed that notwithstanding expressions inconsistent with or contrary thereto * * *," and they construed that as meaning, your Honor, that it automatically waived the conditions of cooperation, notice, and so on, which are on page 19 of the policy. [49]

It is our contention, your Honor, that that is not true. When they put that endorsement in there to provide coverage for these drive-yourself vehicles, this endorsement was for the purpose of notifying anyone that it was in compliance with the ordinance, all right, but it does not say that it is waiving or altering or varying any conditions of the policy. There is nothing in there that says that.

The Court: They rely upon that word "guarantees payment." If it were not for that language, I don't think they would make much point of that endorsement.

Isn't that your point, counsel?

Mr. Velpman: Yes, your Honor, that is correct.

Mr. Du Bois: Yes.

Mr. Lopardo: On the other hand, your Honor, the "guarantees payment" clause has to be read in conjunction with the other provisions in the policy. If it said they would guarantee payment despite any and all provisions, then their contention might be tenable, your Honor; but it does not say "we will guarantee payment despite provisions which we put in this policy." They put the provisions in the policy for a reason, and a reading of the Blodgett's auto lease shows that the person who rents the vehicle is supposed to notify after an accident, supposed to supply the insurance company with summons and so forth, in obvious compliance with those particular conditions of the policy. [50]

Your Honor, I would like to advert to those conditions.

The Court: I have them in mind. You can advert to them if you want to. But do you think those conditions, if they are not altered by this endorsement, would mean that the burden would be on Blodgett's to give the necessary notice and the cooperation, or the burden would be, in this particular case, on Richardson?

Mr. Lopardo: It would be on both, your Honor, because the policy provision provides, and plain-

tiffs so admit in their memoranda, that the driver is an additional assured, and to be treated the same as the named assured, and the rental agreement also provides to that effect, your Honor; and cases in California show that an additional assured is the assured.

The Court: How would Richardson ever even know there was a policy?

Mr. Lopardo: He was told right here in the rental agreement, "You are covered by an insurance policy," and it also mentioned that he is supposed to notify Blodgett's of it, and notify them of any service of summons upon him.

The Court: Is that rental agreement an exhibit attached to any of these documents?

Mr. Lopardo: I don't know whether they put it in the case or not, your Honor.

Mr. Du Bois: It is not. [51]

Mr. Lopardo: However, it certainly will be introduced at the time of trial.

Your Honor, much has been said about notice, and the plaintiff contends that the notice of the accident was given to the insurance company sometime in June. We will admit that. At that time, about the middle of June sometime, about three months after the accident, we received a complaint served on Blodgett's. That is all we knew about that accident, and that is all anyone else, as far as we were concerned, knew about it. But that was notice of the accident, not notice of service of summons upon Sam G. Richardson, and that is the point. And the obvious reason that we couldn't possibly have known

about service of summons upon Sam G. Richardson was because Sam wasn't served, supposedly, until August 3, 1946, according to their affidavit, not according to any proof we have. According to their own affidavit in their own supporting papers, Sam G. wasn't served until August 3, 1946, so we couldn't possibly have had notice of service upon Sam in June.

The Court: I hate to interrupt you, counsel, but I am trying to get information here. I notice there is a reference to the fact that somebody else was sued. What was the name?

Mr. Lopardo: Jordan. He is the executor for Blodgett.

The Court: Was that in the same lawsuit? [52]

Mr. Lopardo: Same lawsuit.

The Court: Did the insurance company defend that lawsuit?

Mr. Lopardo: It never got to trial, your Honor. They had no facts, they didn't know anything——

The Court: Was there a settlement made, $3,-500.00 paid?

Mr. Lopardo: That is right. Satisfaction of judgment returned therefor.

The Court: Was that a default judgment, too?

Mr. Lopardo: No, your Honor.

The Court: Who defended that action?

Mr. Lopardo: It was never defended. It might be interesting to note that at the time there was a satisfaction of judgment as to Blodgett's, without any knowledge of any facts, that a default had already been taken against Sam G. Richardson, and

the insurance company knew nothing about it, it was never brought to the attention of the insurance company.

The Court: I am having a little trouble following this. Sam Richardson apparently sued Jordan as the executor—pardon me, not Sam Richardson—Olmstead sued Sam Richardson and sued, also, Jordan.

Mr. Lopardo: That is right.

The Court: Somebody went in and defended for Jordan?

Mr. Lopardo: It was a stipulated judgment.

The Court: Well, somebody stipulated, then. Who did [53] that?

Mr. Lopardo: The insurance company. Rather, what's-his-name did—Jordan.

The Court: Jordan acting for himself?

Mr. Lopardo: No—That's right, your Honor. He was defended by the same law firm that is now before this court.

The Court: Your law firm?

Mr. Lopardo: That's right, your Honor.

The Court: What I am trying to find out is, the insurance company knew of that suit against Jordan?

Mr. Lopardo: That is right, your Honor.

The Court: And apparently permitted Jordan to enter a stipulation for judgment in a certain amount.

Mr. Lopardo: That's right, your Honor.

The Court: And Richardson is named a defendant in that same suit.

Mr. Lopardo: That's right, your Honor.

The Court: Your office had a file of that proceeding, in your office?

Mr. Lopardo: That's right, your Honor.

The Court: But you never knew Richardson was ever served?

Mr. Lopardo: That's right, your Honor. And I would like to point out the answer to that.

We would be disbarred if we answered for Sam Richardson. [54] This is an excess coverage case. If we went in there and said, "We know that Sam is served and sued, and we are going to answer for him and stipulate to a judgment," Sam could come in and say, "What right do you have to answer for me and create a liability on my part? You have no right." And if we did that we would have been disbarred. And if the insurance company did it, they would have been put out of business. You can't answer for a man unless he is served and properly served, and you can't do it unless he tells you to do it. If we did it, he could come back. Because, remember this——

The Court: Couldn't you have negotiated a settlement on behalf of Richardson, as well as Jordan?

Mr. Lopardo: Your Honor, he wasn't even in the case. He is not in the case until he is served. He wasn't served. We didn't know where he was.

The Court: Was he named as a party defendant or named as a John Doe?

Mr. DuBois: The first defendant, your Honor.

Mr. Velpman: The first one in the lawsuit.

Mr. DuBois: The person for which this office appeared was the second defendant, namely, Jordan, as the executor of the estate of Blodgett.

The Court: What is this argument, again, why you couldn't appear for Richardson?

Mr. Lopardo: Let's say we cover you by insurance, and [55] that the insurance policy is $10,000.00, and you are sued for $100,000.00, it is obvious that the insurance company can't pay any more than $10,000.00, because that is their coverage. All right. We say, "Well, there was an accident, so let's cover this insured." So we go in and we enter the judgment——

The Court: An appearance?

Mr. Lopardo: Yes, an appearance for him. There is automatically, if that is a good appearance, if it is a good one——

The Court: Jurisdiction?

Mr. Lopardo: Jurisdiction, yes.

The Court: All right, go ahead.

Mr. Lopardo: The court then decides, or the jury, damages $30,000.00, as in this case, or whatever it is, $25,000.00. That is $15,000.00 over the coverage. Sam never authorized us, this court never authorized us to accept any judgment or to make him subject to any judgment over $10,000.00. Never. And if we did it, we would have been disbarred; and if the insurance company did it, they would have been put out of business.

The Court: Let's assume that argument is correct, wouldn't due diligence require that you check that file from time to time and see what happened to

Sam Richardson as to service? After all, if he was served and default was taken, you would have six months within which to set aside the default. [56]

Mr. Lopardo: I don't know that there is any case that says there is that kind of due diligence required. The cases in California, as a matter of fact, are overwhelmingly on the other side, and they show that if the assured does not cooperate or communicate, then the insurance company can pull out altogether. They have no affirmative duty of checking a file. Do you realize how many thousand people an insurance company is defending every day? They can't possibly check every file. They can't do it. It is an impossibility. If they did that, the insurance rates would be absolutely prohibitive because of the costs to every insurance company. You wouldn't have insurance. You couldn't afford to pay for it. You can't do it. This is only one case out of thousands your Honor. We couldn't stick our necks out and answer for Sam.

The Court: You admittedly stuck your neck out pretty far on the contract, if the accident happened in Pasadena—I take it you concede that the Kruger case would be the law if the accident happened in Pasadena? Had it happened in Pasadena, which you, apaprently, so you told me, didn't know about for sure until you saw these affidavits as to where it happened—if it happened in Pasadena, and they served Richardson and had taken a default judgment, your contract provided you guaranteed to pay whatever that judgment amounted to. [57]

Mr. Lopardo: Your Honor, that is one of the risks that fits into the premium. But the type of

risk that this court has brought up, as distinguished from that, is not within the premium for the coverage.

In any event, your Honor, the notice is not the notice of the accident but the notice that Sam was served.

The Court: I would go along with you on the ordinary coverage where you know whom you are covering. But where you have got one of these policies that protects anybody that might get hurt, and protects any driver of any of these drive-yourself vehicles, you have got a pretty broad liability. It would seem to me that good business would require a certain amount of diligence. Even a letter to the court saying, "We appear for Mr. Jordan. Mr. Richardson has not been served. Please keep this letter in your file and advise us if and when any affidavit of service or default is requested as to Richardson."

Mr. Lopardo: As I said, the cases do not put that strong a burden upon any insurance company. They don't do it. Remember, we are not abandoning, your Honor, the point that this is not compulsory insurance.

Another point which we are going to bring up is this, that the State does have a section in its Insurance Code which covers cases such as this, Section 11580, and that section specifically says that when a judgment—Section [58] 11580 of the Insurance Code, your Honor—that section provides, in the event a judgment is recovered against an assured and it is not satisfied, then they may sue the insurance company directly on the judgment.

So this endorsement isn't saying any more than that insurance section of the State code, which certainly supersedes any kind of an ordinance of the City of Pasadena as regards extraterritorial coverage.

In other words, Section 11580 provides for the whole State; the City of Pasadena can't supersede that statute. And that statute says "subject to the conditions, provisions of that policy." And there are several cases, some of which are cited in our memoranda, which show that in construing that statute and in using the defenses of noncooperation, lack of notice, and so on, are available to the insurance company, and the ordinance can't abrogate that statute.

The notice here is more than notice of the accident. For one thing, the most important person in the world to us, as to what happened in this accident, is Sam G. Richardson, his notice of the facts as they occurred. We didn't have them. How are we going to put up a defense?

Plaintiff says, "Well, there is a police report."

We already got through saying that that is hearsay. And certainly no defendant is going to be expected to put up a defense on hearsay testimony. The courts don't provide that, [59] the law doesn't provide that, and it is not expected of any defendant to so do, your Honor, and it certainly would be a harsh burden on us to expect it. The man is supposed to give them the notice of the facts, and he didn't give them to us.

There is a question here in point 9, page 19, of the insurance policy. Paragraph 9 of the insurance policy. Plaintiff makes much of the fact that we never requested Sam G. Richardson to do anything. Well, we can't request a man to do anything, your Honor, if we don't know where he is, that is for sure. No. 2, we don't have to request him. The quotation which the plaintiff has in his reply memoranda, to the effect that we have to request, is a quotation which is not out of our policy, and we will show that it is a misconstruction of our policy.

The Court: What quotation do you refer to?

Mr. Lopardo: Your Honor, I would like to find it. Page 8 of the reply memorandum furnished by plaintiff.

On lines 21, 22, and 23 they say: "Policy provisions in re cooperation, etc."

> "... the assured shall ... upon the company's request ... attend ... assist ... cooperate."

Your Honor, I will tell you where they got that, and it doesn't say that. At page 19 of the insurance policy—it [60] is one of the first things filed in the file, your Honor—paragraph 11, about line 14 or 15, "The assured shall cooperate with the company * * *."

It doesn't say "request him to cooperate." He "shall cooperate with the company ... and, upon the company's request, shall attend hearings and trials ..."

The request is not for cooperation, your Honor; it is not for notice; the request is only to attend trials, to attend hearings. So, you see that is ac-

tually a misconstruction. That is a fabricated quotation. It is not in the policy. The word "co-operate" is not requested cooperation at all. It is not here.

I will explain why the assured has to attend a trial when it is requested. Here is why. You have a case, the insurance company defends. Well, before a jury you are not supposed to tell the court or the jury that an insurance company is there, but if the defendant doesn't show up, what kind of an impression is that going to give the court and jury? The defendant isn't even interested enough to come to his own trial. Therefore, upon the request of the insurance company they are to show up at the trial.

How can we request Sam Richardson to come up to the trial when we didn't know where he was, and that he was served?

So the request isn't for notice, it isn't for cooperation, [61] it isn't for assistance; the request is to attend the trial.

So those paragraphs numbered 9, 10, 11, and 12, on page 19 of this policy, require cooperation, notice of the accident, notice of the facts, transmittal of the service of summons to the company, without request. It couldn't be otherwise. This company would be put in an absolutely unbearable position. It wouldn't be able to defend a case.

We had no notice of service, because the only notice they are talking about is the notice of the service of the summons on Jordan.

The Court: Don't you concede, if this accident occurred in Pasadena, that those defenses probably

would not have been available to you, under the Kruger case?

Mr. Lopardo: Your Honor, I hesitate to answer that for this reason——

The Court: I won't bind you to it. But don't you think it looks kind of that way?

Mr. Lopardo: I think I have a good defense to that, I think I have a good defense to the Kruger case under this policy as written, and under the ordinance of the City of Pasadena, because it doesn't inure to the public, and that is the big thing. If this thing inured to the public, rather than merely guaranteed judgment, it would be an entirely different thing. Inure to the public, that is the big thing, and it doesn't, and that is the distinction, that and a couple [62] of others. So I don't really believe the Kruger case is an issue here.

I don't want to bind myself or even volunteer my conclusion in this, but I don't think it applies. There is a difference between inure to the benefit of the public and guarantee payment.

I would like to go on further here.

That point of notice that they brought up, and which we supposedly admit, is notice of service of a summons upon Jordan, it is not notice of the facts of the accident, it is not notice of the facts of service upon Richardson.

Here is just an incidental point, and I would like to skip over it in a hurry. They want property insurance here. Let's read the ordinance. The notice does not require property insurance. So just as a further proof that this policy is both a compulsory

policy and a voluntary policy, look at the ordinance, your Honor.

The Court: Well, let's assume that you are right, that it doesn't require property insurance, but you so contract in your policy.

Mr. Lopardo: That's right. Every insurance company contracts to do something, but every insurance policy is subject to certain provisions. We contract, that's right, but we contract subject to our conditions, and our conditions are notice of accident, cooperation and assistance. Yes, we [63] voluntarily contract; yes, we do. We do it subject to our conditions. That is why we voluntarily contract, and that is further proof that this contract can be both compulsory and voluntary at the same time.

The ordinance doesn't provide for property insurance at all, yet it is contained in there. You see, your Honor, it can be. So, since the ordinance doesn't request property insurance, certainly that cannot be considered.

Plaintiff further contends, your Honor, that once the accident occurs the right arises, and therefore the assured can do nothing to jeopardize the right of the plaintiff.

There is nothing further from the truth. The cases cited in defendant's memorandum will show, and Section 11580 so provides, and there is a quotation to that effect from Cal. Jur., which is quoted in the memorandum, to this effect: The right doesn't accrue until after the judgment. It doesn't say: guarantee any cause of action. Judgment.

So anything that would happen after the accident, but before the judgment, certainly could affect the right of any plaintiff. It couldn't be otherwise, because you can't have lack of cooperation until after an accident, your Honor. You can't have lack of notice until after an accident. You can't have lack of transmittal of the papers and service of summons and the complaint until after the accident. That would all be foolish language in our decisions. So, ipso facto, it has [64] to mean after the accident but before the judgment. So that is an aborted point.

Furthermore, it will be noted that plaintiff in his reply memorandum brings up Section 11580. I am very happy that that is done, your Honor, because they are now admitting that it is the jurisdiction of the state statute which applies, and not the jurisdiction of the city ordinance, and a reading of Section 11580 provides that any recovery will have to be subject, your Honor, to the conditions of the policy. And since our conditions require notice, et cetera, that is all we ask.

Now, your Honor, I would like to bring up a point here: the reply memorandum of the plaintiff's, I believe it is the last couple of pages, page 27. Before that, as a prelude to that, the court is familiar with the fact that a judgment was rendered against Blodgett's. All right. We have joint tort feasors here, your Honor. The judgment against Blodgett's, a joint tort feasor, the satisfaction of which bars recovery.

The Court: Why are they joint tort feasors

when a judgment against Blodgett's was for $3,-500.00, and judgment against Richardson for $35,-000.00?

Mr. Lopardo: That is error, your Honor. The California cases say you can't do that. They are joint tort feasors because the statute so says they are. That is why, your Honor. The ownership statute. And we have got cases to show, your [65] Honor——

The Court: I am a little rusty on this, but isn't there a difference that takes place after a claim is reduced to judgment?

Mr. Lopardo: If it is reduced to judgment, and there is a satisfaction, that satisfaction bars recovery of any other judgment.

The Court: No, I don't mean that. I mean this. If there are two or three joint tort feasors, and you release one joint tort feasor prior to the judgment, you release them all. But after that tort claim is reduced to judgment, does that rule still prevail?

Mr. Lopardo: Yes, your Honor. We have the case here, and I have several others in support of it, because plaintiff tried to make a distinction here, and I was going to show it doesn't hold. The case of Cole v. Roebling, 156 Cal. 443.

The case holds that where two joint tort feasors are sued, your Honor, and there is a default judgment taken against one of them, like against Sam Richardson, and then a subsequent judgment goes against the other one, it is the last judgment which is the prevailing judgment as to amount.

All right. Sam Richardson had a default judgment taken against him for $31,000.00, or whatever it was, but the judgment as against Blodgett's was a smaller amount. And it is strange, because the statutory liability supposedly would have [66] been $6,000.00, and they settled for $3,500.00.

Now, there are two points. I have some supporting cases in that connection, but before I do go into that I would like to bring up this point. The plaintiff tries to make much of the fact that there were some letters written between counsel, saying that this wouldn't be satisfaction as to the other defendants.

Your Honor, those letters wouldn't mean a thing. Just like the releases. The law says one thing, and two parties can say all they want.

The Court: You have a right to waive rights by contract, counsel.

Mr. Lopardo: If they are not against the spirit of the law.

The Court: Is there a public policy involved with reference to joint tort feasors?

Mr. Lopardo: The question isn't is there a public policy, but it is this: When there has been a satisfaction of judgment, and that has been entered, does that satisfaction of judgment satisfy the judgment as to all tort feasors, or doesn't it?

The acts of the attorneys, or anybody else on the side, don't mean a thing. Here is why. The court itself brought up the question of releases. When the plaintiff releases one tort feasor, he doesn't expect to release the other, and [67] neither does the

tort feasor that executes it expect it. He is going to pay a little bit. The court doesn't say, "We don't care what you agree to." A release is a release. The cases don't say a satisfaction of judgment is a satisfaction except when a satisfaction of judgment is a satisfaction of judgment.

The Court: If you had one judgment, that would be different. Here you have two judgments. The judgment against Jordan was based on what, property damage?

Mr. Lopardo: Your Honor, the case of Cole v. Roebling, which I just cited, says, in effect—not in effect, but almost in so many words, on the last page, that it is the last judgment that is the determining judgment, not the first default judgment which was rendered.

I have further supporting authorities. The plaintiff here says, well, that is true as far as joint tort feasors, they are going to admit that, but it is not true as far as joint and several. I would like to cite these further cases to show that where you have a joint liability on the part of tort feasors, a plaintiff may sue those joint tort feasors separately, or otherwise the liability becomes joint and several and the satisfaction of one judgment is satisfaction for all. Here are the cases: Butler v. Ashwood, 110 Cal. 614; Grundel v. Union Iron Works, 127 Cal. 438; Dawson v. Schloss, 93 Cal. 194; Tompkins v. Clay Street Railroad, 66 Cal. 163. [68]

Now, the Grundel case in 127 Cal. 438, and the Dawson case in 93 Cal., talk about this business of where you have got joint tort feasors—joint and

several tort feasors, whether or not satisfaction of one releases the other. So that answers that contention on the part of plaintiff.

Another point is this, your Honor: We have gone outside of the record to show the satisfaction of judgment. That is indeed strange, because the whole basis of this lawsuit is a suit on a judgment, and if we can't show there is a satisfaction of the judgment I don't know what else we can show. By bringing the lawsuit, they had to go outside of the record, they had to sue on the judgment, and we certainly can show a satisfaction of that judgment. But instead they have gone outside of it when they brought in the stipulation, which has no legal effect, your Honor. And it must be remembered that when these letters were exchanged back and forth nobody knew, except the plaintiff, that a default judgment had been taken against Sam Richardson. Certainly we wouldn't have settled this case for that amount of money if we knew there was another defendant who had already been served and a judgment of $31,000.00 rendered against him.

That doesn't make sense, your Honor. That isn't even good business sense.

Then, your Honor, in conclusion I would like to summarize very briefly by just saying this: One, this is an action for summary judgment. Is there a question of fact? We say yes, [69] several. The motion to strike should be denied for the same reason, because there are questions of fact as to——

The Court: The motion to strike rests on a different ground. The motion to strike rests upon the

ground whether or not you legally were entitled to assert certain defenses which you set forth.

Mr. Lopardo: And, of course, this case I cited so holds, 113 Fed. 2d, the Peterson case. One, it is not compulsory; it is voluntary. Since it is voluntary, we are entitled to all those defenses. Since it is voluntary, we are entitled to go to trial to determine whether or not there is any liability on the part of this defendant. And we can't urge too strongly that the cases which the defendant has in its memorandum are few and they hold that an insurance policy, such as this, as far as extra-territorial coverage is concerned, is voluntary and not compulsory, even though it is only one policy.

Two, that the insurance company is entitled to urge those defenses.

Three, that the judgment against Jordan, which was satisfied, is a satisfaction of all these judgments.

It is therefore our contention, your Honor, and we respectfully submit, that the motion for summary judgment be denied, and the motion to take away our defenses be denied.

Mr. DuBois: I apologize, your Honor, for the length of [70] plaintiff's memorandum. It is in my opinion a difficult case because there are so many legal issues involved in the case itself or the defenses that I was anticipating counsel for the defense was going to raise.

I would like to make a few comments and ask the court a question, and then I can perhaps answer the question the court asked originally, which cases does plaintiff ask the court to read?

I have listened as diligently as I can for counsel to point out any factual issues that are yet to be resolved as would defeat the motion for summary judgment. If I understand him correctly, he says that the accident never occurred, that it is compulsory insurance, and something about the policy. My notes aren't quite enough to cause me to recollect what the point was.

Mr. Lopardo: Whether or not the conditions of the policy had ever been followed.

Mr. DuBois: That, probably, in a general way touches on it. It is generally what I had in mind, but I am not sure that is precisely the position taken by counsel.

I want to say that if those are the only four factual matters contended for by the defendant insurer, if the first is the compliance with the conditions of the policy, as to whether or not, I take it this means, in counsel's position, there was a compliance or not, I take it that is assuming that [71] those defenses if properly pleaded are sufficient under this type of policy. Now, we contend that this type of policy admits of no such type of defenses. One of the cases which your Honor has indicated the court has already read, and one that we would urge is worthy of rereading for several reasons, is this Kruger v. California Highway case, which is excerpted quite at length commencing at page 20 of our opening memorandum. The effect of that case, as I read it and as co-counsel reads it, is, if a policy is compulsory, all of these defenses of noncooperation, notice, of forwarding of process, of notice of

accident or notice of suit, are completely immaterial, because it comes within the purview of public policy. And if that case is the law applicable to this case, the plaintiff submits that by virtue of the Kruger case, plus the construction of the policy, Exhibit 1, or Exhibit A of plaintiff's amended complaint, to aid in the determination that it is a public-required or compulsory policy, then any of these defenses raised by counsel, both in the answer and argument here today, are completely immaterial.

I think we might for the purpose of this motion assume that those facts contended by counsel are true, but plaintiff would still take the position that it doesn't make any difference, because under the Kruger case, if you once arrive at a proposition where the Kruger case controls, that this policy is compulsory insurance, that from that time on, then, these [72] conditions and their compliance is, as a matter of law, unnecessary and immaterial. So I think counsel's position as to compliance with the conditions can be decided by this court at this time in connection with, first, a motion to strike, and, secondly, a motion for summary judgment.

Secondly, counsel takes the position on damages, and as I understand his remark that means the amount of damages, if any.

The Kruger case is the leading authority in California, and it is one of the leading cases in the United States, apparently, on the proposition, it is one of the earliest, that for conclusiveness of a judgment against an insurer in a subsequent action,

that both the amount of damages shown, the things that are found by the trial court in the action against the assured, substantially everything as between the injured party and the assured, is conclusive as against the insurer, and that the insurer does not have a subsequent right to relitigate whether or not negligence existed between the assured defendant in the case brought by the injured party plaintiff, nor as to the amount.

We have cited authorities in both the opening and closing memoranda approximately on that proposition.

Counsel also raises a third proposition, that the accident ever occurred.

Now, an examination of the pleadings, I think, dispenses [73] with that particular issue.

The Court: Isn't that covered, also, by your second point, in a subsequent action by the injured person or the judgment creditor against the insurance carrier, the court isn't going to retry the first case?

Mr. DuBois: We contend it is.

The Court: It is just a matter of identity of the parties.

Mr. DuBois: That is correct. We contend that it is as to this assured res judicata, both identity of the parties, amount of damages, the facts found in the prior court, from which no motion under 473 of the Code of Civil Procedure was ever taken, even though that period was coterminous with this same firm of lawyers representing Blodgett's, the named assured under the policy.

But I believe under the pleadings, aside from that position that the court has just suggested, I believe under the pleadings the occurrence of the accident and the situation disclosed by the interrogatories and request for admissions, that the existence or occurrence of the accident as to this plaintiff seated in this court was a fact that was litigated at that time.

That leaves only one proposition, as to whether or not this particular policy was a compulsory policy, and counsel has, in an attempt to say that it is not compulsory, I think, [74] gone into rather a vagary of theory that I think we can answer.

The court has quickly perceived that the thing, apparently, that the Pasadena legislative body was attempting to do was to seize upon a transaction that was intra-city, and while it was within the city limits it was going to do certain things if that particular actor was to accept the benefits of the Pasadena situation or location, that it was going to have to do certain things to receive those benefits. But I want to add one further distinction. The transaction under which this particular plaintiff was injured, which counsel says is the accident, the situs of the accident, I don't believe we are particularly concerned with where the accident did happen. I think, rather, the thing with which the court is concerned, and with which we are concerned, is where did the rental transaction occur, which, as the court has seen from another aspect, the renting is the paramount thing, the accident is an incidental matter, and it is rather immaterial whether it happened

within or without the City of Pasadena, as long as the insurer has voluntarily elected to write this risk and file such a policy with the City of Pasadena, as has been alleged in the complaint, and, by failure to deny, admitted.

I think that dispels, at least it does to my mind, of all of the purported factual issues which counsel contends [75] would prevent this court giving a motion for summary judgment, and/or striking the affirmative defenses which we contend on a careful reading of the law are not sufficient under the law.

We have, and I was endeavoring to locate just before I got up, several citations, namely, one of them Cohn v. Metropolitan, which is a New York case. We have another one that I was endeavoring to locate, particularly, I think it is probably the same case cited by counsel, if the citation is the same, the name sounds very similar, the Merchants Indemnity v. Peterson, which he talks about, 113 Fed. 2d at page 4, if those are the same cases, then we consider those cases as authority for the proposition that under this showing that we have made here today we are entitled to summary judgment on these pleadings.

Let me attempt to distinguish for a moment the probable reason why counsel has cited the Merchants Indemnity v. Peterson case. The facts there—I have got so many cases in mind, I don't want to absolutely represent to the court that my memory is infallible in these citations. This particular case I am probably less sure of my representations as to the exact meaning of the case than I would like to be, but it

is my recollection that the Merchants Indemnity case was a case where a motion for summary judgment was made, and at the time that it was made, on the ground that it was [76] compulsory insurance, there was an allegation in the pleadings which said, because—and I think this was a New Jersey statute, as I remember—because of the New Jersey statute saying once there has been an accident which was not remedied by the judgment debtor, that thereafter there had to be, under the state legislation of that particular sovereignty, a requirement that any subsequent insurance be of a different type. Originally it was voluntary until there was an unsatisfied judgment, and thereafter it became a certain type. And it is my recollection regarding the pleadings of this particular case that in that case it was said in substance in the complaint, and denied in the allegations of the answer, that it was compulsory insurance, and the court said, if this was a type of policy on which the suit was brought that was a result of a prior unsatisfied judgment, then it would be compulsory insurance, that is true, but because the complaint does not sufficiently so allege they will send it back for that showing, and if that showing is made, then the judgment should be directed as it has heretofore been made by the trial court prior to this matter coming up to the Circuit Court.

I am almost positive those are the facts on which that particular case was made. The dicta is clear, if the plaintiff had in that pleading cured that circumstance, that summary judgment would have

there been denied. The [77] rule is well stated, and I think it is applicable to this case.

Cohn against Metropolitan—I know there is a point raised specifically in the points and authorities, your Honor—I am unable to put my finger on it at the moment—holding and citing this Cohn v. Metropolitan, that under these facts, as I believe we have them here, that we are entitled to summary judgment. I will endeavor to have co-counsel find that for us before I finish, so the court will have that particular reference.

Now, secondly, if those four positions that are contended by counsel constitute the only factual matters that require this case to go to trial, triable matter, then I would submit, your Honor, that as a matter of actual law, based on the citations which we are prepared to give further to the court, that it is not a triable issue of fact and this case can, for the purpose of this motion and assuming all of the affirmative defenses that counsel has raised in the answer, assuming for the purposes of the motion only that they are true, under the existing law that is applicable to this case, the defenses should be stricken out and plaintiff's motion for summary judgment granted.

Mr. Lopardo: Your Honor, may I interrupt for a moment, not extensively?

Those four points that he calls factual issues were in [78] response to a question by the court which was, "Presuming I strike as per plaintiff's request, what other factual points remain?"

I just wanted to make that clear. That is in addition.

The Court: I think we are all of one mind, to this effect, that if the motion to strike has to be denied, namely, if those parts of your answer which plaintiff is seeking to strike are proper parts of an answer, proper matters of defense, then there are factual issues to be tried. But if they are not proper matters of defense, if as a matter of law you are not entitled to rely upon them, then the question remains which I asked you: If they are stricken what other factual issues remain in the case?

Do we understand each other on that?

Mr. DuBois: I believe that is correct, your Honor.

That leaves, then, only the matter of noncooperation or nonnotice, as specifically pleaded by the defendant insurer in this case as factual issues upon which the matter can go to trial.

Those are affirmative defenses that we are attempting to strike, your Honor. They are no particular defenses native to plaintiff's complaint. They are a subsequent condition, if the insurance policy is to be construed in its present form, that raise those particular defenses of cooperation or noncooperation, or notice or service of process, and that sort [79] of thing.

Under the Kruger case, under the Oklahoma case, in the opening argument it was mentioned, I think the court has very quickly seized the gist of that case, and the Illinois case that has been cited, and I don't want to any extent repeat what prior counsel

has argued on this matter, I only want to narrow up one issue, if the insurer has failed to insert in a compulsory policy any language that would in any wise limit its liability as to geography, as to parties, as to types of injury, then I think we wouldn't be here. And I think the cases, such as the Oklahoma case, the Illinois case, or the Kruger case, would not have arisen.

The Court: You don't mean what you said. You don't mean if he failed to insert; you mean if he had inserted.

Mr. DuBois: If he had inserted, yes. It is because of that failure to provide in a voluntary policy, that is in the nature of a compulsory policy, the same as we have in the Pasadena ordinance, the same as we have in the language of the policy, which is quoted in Exhibit A of the amended complaint that that particular result is reached.

I want to knock over some of counsel's—with all deference to him I would call them straw men, on these defenses.

The court asked a question of counsel, which one of these conditions that are later provided in the policy would, [80] excepting for the Kruger case, defeat—let me rephrase that. Which of these conditions provided in subsequent parts of the policy, would, excepting for the endorsement starting at the bottom of page 10, defeat the plaintiff's claim?

We contend that independently, we should say in addition to, not independently, we contend that the Kruger case, because of the language in the opinion construing the word "guarantee," which is almost in haec verba with the phrase "guarantee" in this

policy, entitled plaintiff to recover. But, also, none of these conditions constitute legal defenses. That for that additional reason plaintiff is entitled to prevail on this motion for summary judgment.

I was afraid that the court might have indicated by the phrasing of that question that we were relying on but one proposition in our urging the motion for summary judgment.

The Court: No, I understand.

Mr. DuBois: Next, the issue as made by counsel in the reply memorandum, and in argument, that this particular policy is not a compulsory type of policy. Now, plaintiffs would submit, as they have already in their points and authorities, that the particular allegations of paragraph No. 7, page 3, of the amended complaint are—well, it is the same one the court has already read in earlier argument, that it is a required policy.

An examination of the pleadings will disclose that there [81] is no pleading made by this defendant to that particular paragraph.

I have a case, it is cited in the points and authorities, that such an allegation is a question of mingled fact and law.

We would contend, your Honor, that the failure to deny that particular allegation is an admission, first, that the policy is a compulsory type of policy, but, even aside from that, the construction of the policy which appears in our reply memorandum in support of the motion, I think—and I hate to say this to the court—is worth reading. There is quite a bit of work that has gone into it, but I think it is

the kind of matter that cannot be decided without somewhat of a thorough examination of the authorities, and to that extent——

The Court: I intend to read some cases, counsel, but what I am talking about, in your memorandum —well, starting at about page 18, you have about 12 cases on page 18, about 8 or 10 on page 19, I would say you have 15 or 20 cases on page 20, there must be 30 cases cited on page 21.

Mr. DuBois: That is what I was apologizing for. It is a case where there is a lot of law, but there is no bay horse case on all fours with our proposition.

The Court: I had to read it hurriedly, but it may be when I read it more thoroughly they fall into place.

Mr. DuBois: This reply memorandum was prepared in almost extreme haste. Counsel for the defendant was congested [82] with other matters and asked for an extension——

The Court: I am thankful you didn't have a lot of time.

Mr. DuBois: It was done within five days from the date of service. I talked to the clerk and said, "Assuming that counsel will stipulate that we might put the trial over for a while, what if the judge won't let us?" We had to get our issues in of record, and I want to say, in all fairness——

The Court: I shouldn't be critical. I like a lawyer who works up his case.

Mr. DuBois: This is entirely self-defense, your Honor. We wanted to get all the issues in of record prior to a time when we knew whether you would

or would not continue the matter. We thought we would be limited in our trial of the issues to those matters of record, and it is for that reason, in view of counsel for defendant taking extra time, and it was within about six days of the time the matter was coming up for pretrial, that we had to ram this thing home in a hurry. For that reason, with that background, I would like to ask the court this question: We have raised a lot of theories, which in my opinion I believe each one of them would be sufficient——

The Court: Pardon me just a minute.

(Slight delay in proceedings.)

The Court: Go ahead.

Mr. DuBois: We have raised a lot of theories that I [83] in all sincerity believe to be sufficient, in the nature of anticipating counsel's argument on extraterritoriality. Some of these my co-counsel and I disagree with as to effect. I am not asking the court to tell me how we should try our case. I would like to know from the bench, if we might have some indication, as to which of the particular theories the court feels it would like to hear more about.

Now, we have these types of situations. In this particular case an examination of the interrogatories, admissions, and pleadings will disclose that a service of process was made on Richardson about June——

Mr. Lopardo: No. It was August 3, 1946, your Honor.

Mr. BuBois (Continuing): ——about June, and

in a second suit started by the same plaintiff, Olmstead, a second service of process was made about August. Now, the judgment against Richardson occurred about September. The interrogatories, the admissions, disclose that they, the insurer, received notice of the extent of the injury, that it was personal injury, that it happened at a particular point, a car in the possession of a particular man, who was first on the list of defendants, the second name was Blodgett's Auto Service—we contend that is actual notice, and we have a number of actual cases, federal cases, that hold notice is not required from the specific named additional insured. It can come through any of several people, even from [84] plaintiff's counsel. So we are contending that one of the issues, which we would like to hear the court's reaction to, is whether or not actual notice from a person other than the named assured, who counsel are now urging should, under the terms of the policy narrowly construed—that he himself and only himself should give notice. If the court is interested any more in that type of citation, we have a number of others like, for example, the duty to defend. We have cited cases that where an insurer has actual knowledge and has the copy of the summons and complaint in its possession, I am thinking now of the type of case where a chauffeur is the person in possession of a vehicle at the time of the accident, and his employer is the assured, they hold that under that type of circumstance the insurer who has—and there are citations in our points and authorities—the opportunity to defend, having knowledge, has the correlative duty to defend.

The Court: Where are these alternatives set forth in your brief?

Mr. DuBois: In the reply memorandum at about —the first one that calls itself to my eye is on page 24, under No. 10. For example, in this type of policy it is immaterial whether——

The Court: What have these got to do with the motion? I am not going to hear the pretrial this afternoon. I will give you another date for the pretrial. [85]

Mr. DuBois: They have this to do with the motion: Assuming any of these facts alleged, and for the purpose of this motion I imagine they are deemed to be true, any of these facts contended by the defendant insurer are true, even if they be true, under these alternative authorities they constitute still no defense under the existing law.

It is that type of thing that I endeavored to learn from your clerk as to how much authority you would want, or how much it would be reasonable to impose on you, and we collectively couldn't——

The Court: Well, let me read the memorandum. I very frankly wasn't able to digest all of your memorandum. I just had time to skim through it.

Mr. DuBois: If the court could indicate any particular subjects that the court is interested in, on the disposition of the motion, I could certainly very quickly indicate to the court which cases we would like the court to read, and there are a number of these theories that may be, to the court, something that the court already has some familiarity with,

and to that extent I couldn't anticipate with preciseness, with terseness, I should say, what the court would want to hear.

The Court: It is obvious that I will have to give this some study and read some of these cases. I am going to take the matter under submission—— [86]

Mr. DuBois: If the court could indicate—of course it is kind of hard for me to tell the court that I can give you one case out of a category that is going to satisfactorily cover all propositions for which it is urged. I didn't put them in there to be repetitious. They are not cumulative. I would like to do anything I can. I think it is an unfair burden for an attorney to ask a judge to read this many cases. I would hate to have it thrown at me, and I hated to do it to you. On the other hand, I wanted to do the most I could for the plaintiff.

The Court: Lawsuits generally boil themselves down to one or two relatively simple issues. When all the fuss and fury is over with and you sit down to decide one of these cases, you will find it comes down to one or two little simple problems. This may be an exceptional case, but my guess is that a decision in this case will hinge upon much the same sort of proposition.

Mr. DuBois: I think your Honor is entirely right. The only difficulty in my ascertaining those one or two points is in not being able to read your mind.

The Court: I will read the memoranda, and if I need some help I will call on you.

There is one thing that I want to have some

understanding on. Apparently the request for admissions was never answered.

Mr. DuBois: That is correct. [87]

The Court: Under the rules I take it requests for admissions not answered would ordinarily mean that those requests were to be taken as facts. However, in this case there is a representation of a reliance upon some additional time.

Mr. DuBois: I told counsel he could have some more time.

The Court: Accordingly, if I rule on this motion I am going to have to rule on it without relying upon your requests for admissions, since there has been no answer filed to them as yet, or fix a time within which the requests for admissions shall be answered——

Mr. DuBois: I think that is eminently fair, your Honor.

The Court (Continuing): —— and not decide this matter until after the request for admissions has been answered.

Mr. DuBois: I think that is eminently fair.

The Court: Under the rules, on a motion for summary judgment you may rely upon those matters, I see, from reading the rule.

Mr. DuBois: I didn't hear from counsel that he desired any further time. There was never but one request for more time made, and that was for a few days. I assumed that there was no intention to want more time, but I think that is eminently fair, if the court would fix such a time, we would be glad to have

the matter submitted for counsel to make [88] those answers.

The Court: Are we through with the argument now, except for fixing time?

Mr. DuBois: Yes, and for one possibility. If the court could indicate, having not examined the memoranda more than—let me have a few minutes more, I see some things on the second sheet that I would like to comment on most briefly.

Counsel has urged the unconstitutionality of this particular type of ordinance. An examination of the Kruger case, your Honor, passes on that very thing. Certiorari was denied by the Supreme Court of the United States. The citation is given in our reply memorandum.

Mr. Lopardo: The court asked what cases we would like to have read. Since we have so few cases in our memorandum, we would like the court to read those we have cited and those that have been brought up.

The Court: All right, sir.

Mr. DuBois: Mr. Lopardo, is it the intention of your office to file answers to the requests for admissions?

Mr. Lopardo: Yes, sir, Mr. Callaway has every intention to. They would have been in before this time. He wanted you to have them last week, except he was called out of the city and he just wasn't able to do them. He is supposed to be back in town tomorrow, maybe Wednesday, late tomorrow or Wednesday morning. [89]

Mr. DuBois: The interrogatories were answered, and I assumed the admissions were deemed——

The Court: How much time do you want to answer?

Mr. Lopardo: Would Friday be all right?

The Court: Friday is the 7th. You may have to and including Friday the 7th to make any answer you want to the request for admissions.

The matter will be submitted as of Friday, April 7th, on these motions, for the reason that I don't know yet whether I can take your requests, plaintiff's requests, as they are, or whether I have to take the requests as answered by the defendants. So the matter will be submitted as of Friday the 7th. If the answers are in, all right; if they are not in, then I will be content that I can rely upon the requests as made and unanswered.

I will give the matter some study. I am going to be trying an admiralty case the next couple of weeks, which is largely a factual matter, and I hope I don't have too much law thrown at me. If I need further argument, I will set this down for argument and ask you men to level your guns at the particular points I am interested in. If, however, I find that I don't want further argument, I will dispose of the motions sometime after April 7th.

As for a pretrial hearing, I set some cases this morning, and I haven't got my calendar up to date. What have I got on [90] the 17th of April, Mr. Clerk, in the afternoon, or the 24th in the afternoon?

I will set this for pretrial on Monday, April 17th,

at 2:00 o'clock. Of course, if my decision should be in favor of the plaintiff on the motion for summary judgment, then we won't need any pretrial, is that right?

Mr. Lopardo: I am afraid so.

The Court: But if the decision is the other way, and this case has to be tried before a jury, we are going to have some problem demarking the issues of law and fact in this case. Many of these matters are points of law that I don't see that you would submit to a jury.

Mr. DuBois: I believe it is in the nature of a case that has special issues for the jury, your Honor, but not the whole matter. As I understand the authorities, I believe it is a showing of prejudice or a showing of whether or not particular facts constitute cooperation within the meaning of the cases, that is the type of thing that would be the jury-triable issue of fact. The Abrams case in 33——

The Court: Don't give me any more cases this afternoon.

(Whereupon, at 5:00 o'clock p.m., the hearing was adjourned.) [91]

Los Angeles, California
Monday, May 15, 1950

Appearances:

For the Plaintiff:

C. PAUL DuBOIS, Esq.

For the Defendant Royal Indemnity Company:

TRIPP & CALLAWAY, by:

H. C. CALLAWAY, Esq., and

F. V. LOPARDO, Esq. [1*]

(Other court matters.)

The Clerk: No. 4 on the calendar. No. 8729-C Civil, George N. Olmstead v. Royal Indemnity Company, hearing motion of defendant Royal Indemnity Company to set aside judgment, and for a new trial; and hearing motion of defendant Royal Indemnity Company for leave to file amendment to its answer to the amended complaint.

The Court: Proceed.

Mr. Callaway: Shall I proceed?

The Court: Yes, sir.

Mr. Callaway: If the Court please, it now becomes apparent, at least to some extent, why Mr. Richardson, who was the driver of this automobile, and who had a contract with the Blodgett's Auto Service stating on its face they carried insurance for his benefit, never notified the Blodgett people or the company of this accident, or that he was ever

*Page numbering appearing at top of page of original Certified Transcript of Record.

served, because of the fact that he was never served with process.

I am not going to reargue at all the proposition of the effect of the ordinance.

The Court: That is a question of law. If I am wrong, you have got your record on that.

Mr. Callaway: That is right. I say I am not going to reargue it at this time. I do say that the court is confronted [2] with the matter, at this time, of whether or not a judgment against the Royal Indemnity Company should stand, when from the showing made there never was any valid service.

The Court: I have read the file over, and it looks to me like there are about three points that I want to hear discussed.

I don't like to criticize counsel, and I say this in kindness of spirit, but the way counsel for the plaintiff writes these briefs slays me.

Mr. Callaway: It slays me, too, your Honor.

The Court: Don't misunderstand me. I am just an ordinary guy like you are, I practiced law, but what do you do, sit down and copy a digest? This case, and the things you have presented, do present two or three points that I think ought to be considered, but they ought to be grouped in some logical way and get right down to those points.

Now, No. 1 is the general question, Was the defendant served? If he wasn't, can anything be done about it? All the problems that flow out of that. It is a very definite problem that is presented.

No. 2, that is the question as to whether or not,

under the policy, property damage is included, as well as personal liability.

It seems to me No. 3 is the question as to whether or not that $3,500.00 payment is a credit on account of the [3] liability of the company.

There may be other problems. In spending an hour and a half on it this morning and trying to find out what this is all about, those stand out as being problems, but I can't say in reading plaintiff's brief that it was particularly helpful to me in trying to form an opinion on those things. It is true anybody can find all sorts of cases with various shades of meaning, but if you have a particular problem to decided you want to cite the cases that are on the nose or closest in point and not throw at the court an entire digest.

I have other cases to decide. I have one of Mr. Callaway's cases that I have had under submission since February that I have got to decide one of these times. That is just one of them. I can't read the number of cases that counsel cites in his briefs. I couldn't possibly do it, unless I had only this one case to work on.

Mr. Callaway: Your Honor. I think it casts an unnecessary burden. I have read those cases, every one, Mr. Lopardo or I, and they are not in point. There is no use talking of the aspect of a voidable judgment. This judgment is either void or it is good.

The Court: Let me ask you on that, let's just take up this first point on this question of lack of service. Counsel for the plaintiff, as I understand

his brief, contends that under 473 or 473 (a) of the C.C.P. there is a year within [4] which a motion can be made.

Mr. Callaway: Your Honor, that has nothing whatsoever to do with it. This is a procedural matter in which the state courts—the federal court's Rules 59 and 62 (b) govern the federal court.

Mr. Lopardo: 60 (b).

Mr. Callaway: 59 and 60 (b), and the procedural aspect of the case, in so far as the state court rules are concerned, has nothing whatsoever to do with it. Now, we have cases and have cited cases——

The Court: Mr. Clerk, let me see your copy of the rules. Let's see what those rules provide.

This is a diversity case, and do we not follow state law in this matter?

Mr. Callaway: No, sir. You do in substantive matters.

The Court: We follow the procedure under 60 (b) on newly discovered evidence, and so forth.

Under that Section 1, newly discovered evidence, it then becomes a question whether that evidence is material. Then you have another one for the judgment is void, it then becomes a question whether the judgment is void, and then we are tossed back to substantive California law on those subjects.

Mr. Callaway: But not procedural, where you have to say that the Code of Civil Procedure of California requires a motion to be made within a given time, because that is purely [5] procedural and not substantive.

The Court: I think you are properly in court

with your motion for a new trial under 60 (b), when you allege you are relying upon newly discovered evidence. The question is whether your evidence is material and whether or not the evidnce, if material, or if admissible, does render the state court judgment void, and whether or not the——

Mr. Callaway: Reading on down, whether or not the judgment of the state court is equitable and should have respective application.

The Code of Civil Procedure governing the time within which a motion could be made to set aside a judgment in that court is not binding on this court in any sense whatsoever, in that it is purely procedural and not substantive.

The Court: In other words, then, all this talk in the brief about the year period, and so forth, you think is beside the point?

Mr. Callaway: It means nothing. The case of Erie v. Thompson, I believe, clearly decides that proposition. It is a United States Supreme Court case. It clearly decides that this court is not bound in any procedural matters by the state court, and that is purely procedural as to how long will it be before you might make a motion to set aside the judgment.

The Court: But we still get back to California law. [6] Assuming, ordinarily, a judgment not based upon personal service is a void judgment, if under California law that judgment after a certain period of time can't be attacked, then is it a nullity?

Mr. Callaway: I think so, your Honor, for this reason: In other words, it has to be procedural, the

length of time within which a certain thing may be done, and this court is not bound by that. There is one case that we have cited where, as I remember, it was a proposition like this: A man and his wife were having trouble, and she somehow got him to go to the State of Florida, she actually served him, personal service, there wasn't any question about that, but when the matter finally came back to the federal court in New York the court said that was fraudulent on its face. He was lured down there by fraud, and even though it was actual personal service, we here and now are going to set that aside.

It is the same proposition. In other words, the judgment of the State of Florida was perfectly valid on its face. It was for the first time attacked in federal court in New York State. It is in our brief. Wyman v. Newhouse, I believe, is the name of that case.

The Court: Those are matters of law which we can probably decide by reading some of those cases. But what about this? Your affidavits indicate that you found out in March that this man was in a penitentiary. It seems to me you [7] found out in March of this year.

Mr. Callaway: That's right.

The Court: Then it wasn't until April that you had him interviewed, then the case went to trial apparently about April 3rd, and about April 11th I rendered a decision. On April 10th you had in your possession all the facts. Then findings were prepared and conclusions of law, and we don't hear anything from you. I don't know. I kind of got the impression

that you sort of felt this might have been a sort of a sail in the wind that some lawyers like to have sometimes, that you sort of lie back on until everything goes wrong, and then you pull out your trump card and then you say, "Richardson was never served."

Mr. Callaway: No, your Honor. The truth about the matter is that Mr. Dunne was in San Francisco the weekend of the 10th, I believe, but he hadn't gotten back here, and I think we had notice of the court's ruling the next day. We had to prepare this affidavit and get Richardson's signature to it.

The Court: Yes, but what about the period between the time in March and the date of trial here? The trial was coming up. All these issues were going to be before the court.

Mr. Callaway: The trial was set May 15th. This was a summary judgment. I didn't anticipate a summary judgment in [8] this case. If the trial date—if you remember, I think it was the 17th.

The Court: That is right, the trial date was in May, and this was on motion for summary judgment.

Mr. Callaway: And I carry quite a heavy calendar. I can't do but one thing at a time. Mr. Dunne was dispatched within a week, when we received a letter from the warden that this man was in the penitentiary, within a week or ten days he was dispatched up there to personally interview him.

This wasn't a question of not playing all the trump cards, because we would have like to have presented this matter to the court before summary

judgment was entered. We just weren't in a position to do it.

You will remember this, also, if the Court please, from the information we received from Richardson, then we had to send to Texas to get the affidavits from his mother and anyone else that had personal knowledge of the fact that he was there, actually.

The Court: How could people remember back on August 3, 1946, whether they were or were not in a certain place?

Mr. Callaway: I think this: If I made a trip to New York, I would be able to remember the date that I made it. I might have to refresh my recollection from something. I don't think that is improbable.

The Court: Viewed with the rather explicit affidavit [9] of the deputy sheriff—in this case you are not confronted with just an affidavit of service where a man says, "I served somebody at a certain time"—period. Here you have a case of a deputy sheriff who not only recalls some of the events, but made some notes at the time, and the notes make sense. They fit in with what in the ordinary course of events you and I would run onto in our life. The fellow said, "What is this about?" and the deputy sheriff told him, and he said, "That happened two or three months ago, I remember." And the deputy sheriff makes a note. That is the type of thing that happens. It has the indicia of truthfulness about it.

I got sued one time for $50,000.00. A fellow's wife had an accident, the fellow served me with the complaint. That was my first question, "What is this all

about?'' And then when I saw I was sued for $50,000.00, I don't think what I said would be printable.

But this remark that the deputy put on the back of his document has the indicia of actual veracity and truth.

Mr. Callaway: Let's analyze that just a minute.

The Court: And Richardson is admittedly an ex-convict, or presently a convict; he is not even an ''ex,'' he is in the ''big house.''

Mr. Callaway: The description the deputy sheriff gives of him doesn't even fit him. And the truth about the matter is—I have sent to the warden an affidavit, I don't know [10] why it hasn't been returned, which I intended to file here, for the warden to give you an actual description of Richardson.

The Court: Where is your description of him, in what affidavit?

Mr. Callaway: In his own.

The Court: Let's have a look at it.

He says he is five foot nine, 175 pounds, straight hair, light brown with gray at the temples.

Mr. Callaway: Never wore a mustache in his life, in 15 years, that is, he said.

The Court: He says five, seven or eight, 150 to 160 pounds, wavy black hair, small mustache.

Mr. Callaway: Then it is peculiar to me that this man, Robert S. Halloway, who apparently pointed Mr. Richardson out there is no affidavit from him.

Don't misunderstand me. Maybe your namesake,

Mr. Carter, thinks that he did serve Richardson. But it has always been peculiar to me.

The Court: No relation of mine. I don't even know the man.

Mr. Callaway: I know that. I facetiously made that remark. It has always been peculiar to me that for all this time Richardson was sued in this matter, or that he had been served, that he wouldn't have turned it over to the Blodgett [11] people, at least, or mailed it to us, and it is his contention that he never was, and I don't know why he would make that contention now if it wasn't the truth. He has nothing to gain, I don't suppose.

The reason why I think the court should set this aside is that service is a question of fact, and I think the court ought to be confronted with these witnesses in this matter, and that is the reason why I think a motion for a new trial should be granted and the matter tried out on the issue of fact. It is never satisfactory to produce evidence by way of affidavit for either side. A man either was served personally or he wasn't. He says he wasn't.

I feel this way about it: Certainly I can't see how it could be said that the Royal Indemnity Company ever had a chance to interpose any defense in this case. In other words, I haven't any way of knowing, but I think on a contested matter, I don't think Mr. Olmstead would have any judgment for any $31,000.00. That is No. 1.

No. 2 is that, after all, we were pretty much defenseless or helpless in this matter.

The Court: What does an insurance company do in a case like this? Your company knew on June 12th of 1946 that Jordan had been served.

Mr. Callaway: That's right.

The Court: And you knew that Richardson was named as a [12] party to the lawsuit.

Mr. Callaway: That's right.

The Court: What do you do in a case like that?

Mr. Callaway: First of all, we go to look for Richardson, because we want some information about the facts of the case, to know what to do with relation to Jordan. Now, what could we do? You certainly wouldn't expect me to appear for Richardson. I would be disbarred for it if he wanted to confront me with it. I had no authority to appear for him, and neither did the company. We couldn't do anything.

The Court: Is there nothing in the policy that would permit you to appear for him?

Mr. Callaway: No.

The Court: Actually——

Mr. Callaway: It happens all the time. It happens in this way: Somebody says, "I don't want to have to serve this driver, I have already served the principal, won't you appear for him?"

"No, I won't appear for him."

"Why?"

"Because suppose the judgment ran over the policy limits, the driver says to me, 'I didn't authorize you, you are not my lawyer, I didn't authorize you to appear for me, I never have been served with anything, and you go ahead and pay this, it is your

fault, I didn't authorize you to put me in this [13] lawsuit by a so-called consent asnwer.' "

It comes up all the time. You want to do it, you don't want to put the other side to the trouble of going out and serving somebody, but they have to do it, because you can readily see how many things might happen.

The Court: Then going on with the matter: Subsequently, probably in September of '46, you must have known that a judgment was taken against Richardson.

Mr. Callaway: I don't know whether we did or not. I think we did, though.

The Court: I don't think there is any affidavit in this file that indicates that you didn't know.

Mr. Callaway: I think we did.

The Court: What did you do in that case?

Mr. Callaway: I can't do anything. We haven't, still, any authority to appear there and make a motion to set it aside. We don't think it is any good, as far as that is concerned, as far as we are concerned, but what authority did I have as attorney for the Royal, on behalf of Richardson, to appear there and set aside a judgment for any reason? I didn't have any reason at that time to know that I could set it aside, or had any ground for setting it aside. All I know is that he never afforded us an opportunity by telling us about the accident, first, and second, about the fact that he had been served, and he hadn't afforded us an opportunity to [14] do anything, and he still admits that.

The Court: Is there no situation in which an

insurance company has a right to come in and appear for an assured when the insurance company would stand to be personally liable if they didn't appear?

Mr. Callaway: Certainly the situation arises when the assured performs his contractual obligations and tells you, "Here is a suit, take care of it." That is a different deal, again. But I would say this, if we had appeared here for Richardson voluntarily, regardless of our policy limits, we would be liable for the whole judgment. He would say, "Well, I didn't authorize you to do it, I never was served; what right did you have to step into the breach and get me into it?"

The Court: Some day the legislature, or a court, is going to knock this legal fiction of insurance companies defending in the names of assureds in an ashcan. Wigmore on Evidence, if you will check into it, has a very strong opinion that it is not a proper procedure, and that insurance companies wouldn't be any worse off if they had to come in and appear in their own proper names, than coming in and appearing in the names of assureds; that people would realize that excessive judgments rendered against insurance companies were going to cost them more money.

That is the fix we are in now because of that situation. [15]

Mr. Callaway: Let me show you why I think you are wrong. The first state to adopt compulsory insurance was Massachusetts, sometime in the early twenties, and in Essex, Sussex, and one

other county, that make up the Boston area, for four years there was not one single defense verdict on any kind of an automobile case in those three counties. I went up there, and know. And these lawyers used to come in and say, "Don't talk to me about the facts of the case, you haven't had a defense verdict in three counties in four years." So maybe there is something to the fiction in jury trials.

The Court: That would happen, but it would eventually level off, that is Wigmore's view, that it would eventually level off.

Mr. Callaway: Maybe so. Maybe it has levelled off, but in the early twenties that is what I was informed.

The Court: Wigmore says it would level off, because after verdicts were rendered against insurance companies, the rates would go up and jurors would realize it was costing them more for insurance. But then, he said, you would have a truthful situation where the real parties were appearing before the court.

Of course we are just discussing this academically, because it has nothing to do with this case.

Mr. Callaway: I feel that this is a matter that, if [16] there is any question in the court's mind about the fact that there was or was not personal service on Richardson, that the court ought to take evidence and be confronted with the witnesses.

The Court: You have a different kind of agreement with reference to Richardson than you did, for instance, with Blodgett's or Jordan. If I am

right that this was one of these compulsory policies, the agreement of the company was to pay any judgment that was rendered against any one of these drivers, and it would obviously be within the contemplation of the parties that those drivers might or might not be responsible people. They might or might not bring in complaints if they were served. They were not paying any premium themselves, they had no relations with the company. Probably the very reason that the city required insurance was that some of them were pretty irresponsible. So, when the insurance company writes a policy that it is going to pay a judgment pertaining to any one of those individuals, number one, they are assuming a risk for what may have happened here, namely, that Richardson was served and didn't bring it in, or, number two, maybe because of the very nature of that policy there would have been some right in the insurance company to have made some appearance in the case.

Mr. Callaway: Judge, we agree to do that in every policy we write. We agree to pay whatever judgment is finally [17] rendered against the assured.

The Court: But in your ordinary policy you are dealing with an assured who has had dealings with you, one of your agents has written the policy, and you know where the man lives, you received the premium from him, and you have had some relations with him. These extra insured were people that you had no dealings with at all.

Mr. Callaway: If you loaned your automobile to one of your friends, we don't know your friends.

The Court: That is right.

Mr. Callaway: Or we don't know your employees. You might have a chauffeur that would go out and get drunk and cause forty or fifty thousand dollars worth of damage. We have no control over that. We don't think you are going to do that, but we don't know that your chauffeur won't do it, or somebody else that might be working for you in a different capacity. So that is true in all these cases. But the point is that if the man was never served, it looks like an inequitable thing to say that the Royal Indemnity Company should pay a default judgment, and to pay it in an amount, even, in excess of their policy limit.

The Court: Supposing he was served, how do you argue it then?

Mr. Callaway: If he was served, then it becomes a pure question of law as to whether you are right about this being [18] compulsory insurance or ordinary insurance, to use that term, a pure question of law.

The Court: Let's assume for argument two things: assume that he was served, and assume that as a matter of law that compulsory policy covered accidents within the City of Pasadena—rather, without the city, as well as within the city; now, where do you go from there? Do you concede, then, there is liability?

Mr. Callaway: I have to, if you are right about that.

The Court: Do you mean there would be no relief, no way in which a company could protect

itself? Let's assume that he was served, and then the company, we will say, has some information indicating that he was served, but they can't find him to interview him, and assume, as a matter of law, this was compulsory insurance that covered the accident outside the City of Pasadena, does the insurance company have to set by and let judgment be taken by default against them? Is there no remedy?

Mr. Callaway: I wouldn't know what relief they could have.

The Court: You are a good lawyer. Supposing that situation developed, what remedy would you seek? There must be some remedy that would prevent you from being nicked by a default judgment.

Mr. Callaway: Everybody is supposed to have some grasp [19] of their own affairs, and if you are not asked to defend, as attorney for the Royal Indemnity Company I wouldn't put in an appearance for anybody that hadn't gone through the usual channels; I would refuse to do it, because I don't think I have a right to appear for people that don't want me as their own lawyer. I just wouldn't do it.

The Court: I am just thinking out loud, and this may sound silly, but can you go into court and have the court appoint some lawyer?

Mr. Callaway: I haven't heard of it being done.

The Court: You appoint lawyers for people when they are missing.

Mr. Callaway: I think the average court would be reluctant to do that. They would say, "I am not going to appoint a lawyer for someone that is

not before me and is not seeking a lawyer, and for all I know is not incompetent in any way."

The Court: I am inclined to think there would be some remedy. I don't know what it might be. But I know if I knew that I was representing an insurance company, and the assured in the position Richardson was in had been served, and I couldn't find him, and a default judgment was imminent, it seems to me I would be up at night figuring out some remedy.

Mr. Callaway: Let's carry that one step further. Assume that you discovered that a default had been entered against him, and you still can't find him, what grounds are there on [20] which you are going to seek to have that set aside, even if you are willing to take the risk of acting in his behalf? He is not there to tell you. The Royal Indemnity Company has no right to appear in the action; they are not a party.

The Court: Once the default was taken against him, and he had defaulted, then your argument about appearing for him and his being subjected to a big judgment falls of its own weight, because, having defaulted, he has laid himself wide open for the full prayer of the complaint; therefore, it seems to me that you are not in the danger of—you can't make it any worse than it is. Supposing you appeared for him——

Mr. Callaway: Yes, because he comes along and says, "You had no right to appear for me, you made a general appearance and that cured any defect in the service I knew all the time I wasn't served in

this matter, that is why I didn't call upon you to act for me. Now go ahead and pay it off, even in excess of your policy limits."

The Court: I am arguing this from the standpoint that you knew he had been served.

Mr. Callaway: You mean where we knew? Well, I don't know. I just never have been confronted with a situation where we knew that a man had been served and we couldn't locate him, as to what to do.

The Court: Particularly in the federal practice where under the rules the court looks to who is the real party in [21] interest, more so than in the state practice.

I think you would have a remedy somewhere.

Mr. Callaway: I don't know what you might do. I haven't tried to fathom it out, because I never have been confronted with it. Again, I am not trying to reargue the matter, but I felt that Mr. Richardson was subject to the cooperation clause in the policy and was required, in order to take advantage or the benefit of this insurance, to notify us of an accident and to cooperate with us to the extent of turning over any suit papers that might be served on him, so that we could take timely action. He didn't do that. And we knew that much. We couldn't locate him, and that was that.

The Court: Your affidavits show that this fellow Clayton was put to work on finding Richardson March 2, 1950.

Mr. Callaway: That was before that, your Honor. My affidavits show that——

The Court: Somebody else had tried before?

Mr. Callaway: Yes. That was in preparation

for the trial and in preparation for meeting the motion for summary judgment.

The Court: On March 15th the warden wrote you that he was in the penitentiary, so sometime between March 2nd and March 15th Clayton discovered that he was in the penitentiary.

Mr. Callaway: Here is how he discovered it, and it all appears in the affidavit. [22]

The Court: It doesn't give the date.

Mr. Callaway: Mr. Richardson's brother told him that he was in some penal institution, but he didn't tell him which one. Then what we did was circularized them all.

The Court: Anyhow, on March 15th, then, you had a letter that he was in Folsom.

Mr. Callaway: I think that is the day.

The Court: The motion for summary judgment was heard on April 3rd. The decision wasn't rendered until April 11th, and the findings weren't signed until the latter part of April.

Mr. Callaway: Well, your Honor, I felt after we located him it was a matter that an attorney should undertake as far as an interview was concerned. As soon as I could arrange it, the first fellow that was free, someone was dispatched up there, and that was Bob Dunne, and at that time we didn't know what Mr. Richardson's story was.

There was nothing in that situation that we didn't want to present to the court by this time.

The Court: All right. Your argument on the matter of the property damage is that there is nothing in the contract of insurance that covered prop-

erty damage, it covered public liability, is that right?

Mr. Callaway: It is a matter, again, of the legal construction of the contract.

The contract tells you what property damage is, and we [23] can't read into that anything else.

The Court: I want to hear from them on that.

On the other point, it is your contention that this judgment of $3,500.00 is a credit. Is the file of that Superior Court judgment in evidence in this case, Mr. Clerk, do you remember?

Mr. Callaway: I don't remember.

Mr. Lopardo: Not the whole file, but the plaintiff did file an abstract of the judgment with their answering papers in this thing.

The Court: The judgment itself is not in evidence?

Mr. Lopardo: No.

The Court: The abstract of the judgment just shows a judgment against Richardson. What was that judgment in the state court? Were there two different judgments, or one judgment? There must have been two different judgments.

Mr. Lopardo: That's right, your Honor.

The Court: What is your argument now, that the amount paid on the Blodgett judgment should be a credit against this one?

Mr. Callaway: This is now a suit against the company on its policy, and the policy says they shall be only liable for so much money for one accident. The undisputed evidence is that it has already paid——

The Court: Where does it say it will only be liable for [24] so much on one accident? In "Coverages" on the second page of that typewritten copy attached to the amended complaint?

Mr. Callaway: Page 2 of the amended complaint, Exhibit A, line 2.

The Court (Reading): "Bodily injury liability. Each person $15,000.00. Each accident $30,000.00."

Mr. Callaway: "Bodily injury" is then described on the same page, 25 to 29.

Then "Property damage" is defined right after that.

The Court: "To pay on behalf of the insured * * *" Of course you had more than one insured here.

On page 3, "Definition of 'Insured' "—"includes the named insured and also includes"—subdivision (2), line 29, "under coverages A and B, any person while using an owned automobile or a hired automobile. * * *"

That doesn't change it, does it?

What does this mean, "The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement"?

Mr. Callaway: (2) is "under coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof"——

The Court: Where is division (2)? Where do you find division (2)? Is that the one entitled "De-

fense, Settlement, [25] Supplementary Payments"?

Mr. Callaway: Division (2) I think starts on line 29 of page 3.

The Court: Probably you are right there, division (2) must mean division (2) of roman III.

We will take a short recess and then I will hear from counsel for the plaintiff.

(A recess was taken.)

Mr. DuBois: We regret if plaintiff's memoranda have not found favor with the court, but we have raised issues on as many grounds as seemed advisable or necessary.

In answer to the court's inquiry, how were they prepared, this particular memorandum in opposition to this motion was prepared after a reading of all of the citations included. That cannot be said and, I explained to the court at the time of the argument on the motion for summary judgment, was not said of the memoranda there, because of the shortness of time after the reply memorandum in oposition to the motion was filed, and the period of time involved and having that in in time to comply with the rules in advance of the oral argument.

Plaintiff takes the position in opposition to this motion that this defendant Royal Indemnity cannot at this late date in this court attack the Superior Court judgment. That is the gist of the plaintiff's memorandum in opposition to the defendant's motion. [26]

The Court: Now, you have to break that down. Certainly the defendant can move for a new trial

on the ground of newly discovered evidence. You concede that, don't you?

Mr. DuBois: Surely, I think Rule 60 provides for that.

The Court: Then the question is: Is the fact, whether it exists or not, that Richardson was not served newly discovered evidence?

Mr. DuBois: My answer to that would be that that would be newly discovered evidence. But it is not timely discovered evidence.

The Court: Let's assume for argument that it is timely, just for argument; then is it material? How does it affect the judgment here in the federal court? I am impressed by defendant's argument that you are off on a procedural point as to state practice, while the defendant doesn't need to be concerned with that.

Mr. DuBois: It comes down to this question, as I see it, this is a state court judgment that we are considering, and to modify or to change the effect of the state court judgment, it must of necessity require state court authority.

Now, the cases cited by the moving party, Wyman v. Newhouse, on page 9 of their points and authorities in support of their motion, and Bower v. Casanove, both are distinguishable, in my opinion, because of the fact that the court there was considering an issue of fraud in the judgment [27] creditor getting jurisdiction in a state court, and I think the element of the issue of fraud being presented is a vast distinction with what we have here.

The cases in California say that is one of the rec-

ognized exceptions to the California procedural rule. But an examination of Wyman v. Newhouse will reveal that apparently in the New York District Court, where that case was decided, the opinion shows that there was no Florida procedural law to govern, or to provide how a state court judgment was to be modified.

Apparently, as I read that opinion, there was nothing to control. And there is a reference that in the absence of Florida substantive law they had to go to the law of the forum, namely, the United States District Court in New York.

Now, a comparable situation appears in the Bower v. Casanove case where the effect of that opinion seems to say they must examine the Illinois law to determine what can be done in the federal court.

Now, I have searched quite at length to find out is there a federal case on the proposition which does not include the element of fraud, and an interlineation just at the last minute before filing, on page 7 of plaintiff's memorandum in opposition to the motion, the case of Butler v. McKay, 138 Fed. 2d 373, certiorari was denied, seems to indicate to the plaintiff that the state rule to control a federal [28] court in its deliberation regarding the effect of a state court judgment.

That is the nearest that I have been able to find yet.

That is at the first line, your Honor, after the subject on number VII, page 7 of the memorandum.

The Court: I have found it.

Mr. DuBois: So I think, if I understand the

court's question, that case is authority, we must go, in federal court, to state court procedural laws to determine the effect of the state court judgment.

If that is correct we have here in the pleadings an admission that the judgment was taken. The effect of my affidavit filed in opposition to this motion is for one purpose, principally: that for a number of years from 1946, in September——

The Court: Where does this affidavit appear?

Mr. DuBois: The first exhibit attached to our memorandum in opposition, your Honor. It follows page 22 of the memorandum, and it is to this effect——

The Court: Let me read that. I missed that somehow or other. I missed that in going over this file. Let me read that.

Go ahead.

Mr. DuBois: The intended showing on that affidavit was to the effect that this defendant Royal Indemnity has had [29] knowledge for a considerable period of time, of substantially four years. If I understand Mr. Callaway correctly, this morning in oral argument I believe he said he admitted personal knowledge of the existence of the default judgment sometime in the latter part of '46. Now, the affidavit tends to show there was a sheriff's keeper in the business, place of business of the dedenfant Richardson, on a writ of execution, from February 19, 1947, until October 1, 1947. It also tends to show that there was a recording of an abstract of judgment, which is annexed as an exhibit, on September 18, 1946, which plaintiff would

urge would be constructive notice, both to the defendant Richardson and to the defendant Royal. And there also is the showing of the Department of Motor Vehicles of the State that there was a suspension of driver's license. So that we say, based on those facts, which I believe were uncontrovertible, that as to both defendant Royal and defendant Richardson there was some knowledge as early as 1946, in the fall, and actual knowledge in the early part of '47, so that, both as to defendant Royal and defendant Richardson, they cannot at this time in this court come in on a motion to vacate a default, and I think the authorities that we have cited, the California substantive and procedural treatment of this proposition, amply support that proposition.

In fact, I am wondering whether counsel in making this motion today is in effect making a special appearance for [30] defendant Richardson in trying to get this modified.

I assume that the record is correct and he is only appearing for the defendant Royal. But it is my understanding of the California authorities that the only person that can attack this judgment is the defendant Richardson in the Superior Court, where the control of this particular judgment lies, or on appeal, and there are two remedies suggested, as I read the record, either a motion to vacate under 473(a), or an independent suit in equity. But an examination of the authorities indicates that there must be certain things which can be shown before even that remedy would be available.

We are urging the proposition that under the

facts that seem to be conceded, that where there is in existence actual knowledge on the part of the moving party, and a substantial lapse of time, there are cases cited ranging anywhere from eleven months to two years, and absent the element of fraud, that under those circumstances, keeping in mind and coupling it with the assumption of actual knowledge that under such circumstances such a motion cannot successfully be made, and there is one citation in the points and authorities that even as to the independent suit in equity there must be a showing on the part of the moving party that there is, first, a good and meritorious defense. There is no such showing here. There must be a showing that the result would be different if a new trial were granted upon the vacating of the [31] default. There must be a lot of elements shown, none of which exist here.

This motion is not made by defendant Richardson, and that is why I asked counsel the question, who is, in fact, the moving party here?

There is one case that is cited, and I think it is probably interesting enough to specifically call attention to it, that appears on page 16 of the plaintiff's memorandum of points and authorities. This is talking about the equity side of the Superior Court. It is a recent case, 83 Cal. App. 2d, Young v. Baker:

> "The bare allegation that the summons and complaint were not served * * * without the averment of facts showing that she had a meritorious defense * * * is insufficient to state a cause of action."

It would be my contention that if those cases are applicable it would be difficult for this moving party, or defendant Richardson, at this late date, in the face of actual knowledge, to go into equity in the Superior Court and be able to stay in court on the statement of the complaint, statement of the cause of action.

But, in any event, there must be these other showings of diligence, and the attempts to relieve themselves, and the bringing of relief, there must be a freedom from fault on the part of the moving party. [32]

The California Supreme Court has, I think, rather in point, ruled on a similar prosposition. That appears on page 6 of our memorandum, and I have directly quoted it, in Smith v. Jones:

> "Undoubtedly, though it appear from the record of a judgment entered upon a default that service was made upon a defendant, and hence a judgment against him is valid upon its face, it is well settled that such a judgment may be set aside by motion * * * under section 473 of the Code of Civil Procedure * * * But in order to invoke the power of the court to set a judgment aside on the ground that it was entered against a party defendant without service of process against him at all, the motion must be made at a reasonable time or the right to make it is lost * * *"

I think the cases are clear that there must be an equitable showing to minimize laches, to show diligence and good faith, and he must proceed

promptly and he must show that a different result would attach, and he must show—one case here holds, and I have quoted it at length, he must show some disposition of liability other than what was found would result.

The Court: You bring this action against the insurance company by virtue of California statute, don't you? [33]

Mr. DuBois: There is an Insurance Code section——

The Court: I thought there was a statute in the general laws of California that after you have recovered a judgment against an assured, and he didn't pay, you could then bring a suit against the insurance company.

Mr. DuBois: I think that is not in the general laws, your Honor, but rather in the Insurance Code, which, as I recall, is 11580, which provides in the event an insured doesn't pay after judgment, then the judgment creditor is entitled to sue direct.

The Court: Is there any language in there about being bound by the judgment in the state court?

Mr. DuBois: Yes, there is, that is what I was trying to answer your question. You say, are we suing under a state statute? Probably that answer is compound: Yes, under that Section 11580, and also under the provision of the typewritten endorsement on the policy, which says—and I am sure the court is familiar with it, but the substance is: "We agree to pay the amount of any final judgment rendered against an assured."

I think, to be as specific as I can, we are suing

both on the contract and under the effect of that state statute.

The Court: If you are right in some of your contentions, wouldn't your position be that what the defendant should do in this case would be to go in the state court and get that [34] judgment set aside and vacated?

Mr. DuBois: That is correct.

The Court: Before they presented the matter here?

Mr. DuBois: That is correct, that is our proposition.

The Court: Have you argued that in your brief?

Mr. DuBois: Yes, I have.

The Court: Where?

Mr. DuBois: On the proposition that they can't proceed in this court at this time, it is not the proper forum, they haven't brought it within due time, they have remedies under the cases I have cited in the state court to attack in that fashion, which they haven't done. There is no showing here of anything excepting the insurer moving to vacate the effect of a state court judgment, which I have taken up under the proposition that they cannot collaterally attack a state court judgment.

A trial court of general jurisdiction, as I understand the cases—and they are cited in the memorandum—cannot attack, modify, impeach, or vary the effect of a judgment that is final in another trial court of general jurisdiction. It must be a direct attack in that court.

The Court: Let's go to this matter of property

damage. Where do you find any support for any recovery for property damage?

Mr. DuBois: Under the doctrine of cases that start [35] about 28 Cal. 2d, Hunt v. Authier, your Honor, which are relatively recent, which, in effect, as I tried to understand that opinion, constitutes case precedence for what apparently had been something in the nature of the common law before that time. Hunt v. Authier has been subsequently followed in a number of cases which are cited in our closing memorandum of points and authorities, and counsel now is saying——

The Court: Just a moment. You say your closing points and authorities?

Mr. DuBois: Yes, about the last page of the plaintiff's closing memorandum of points and authorities in support of the motion for summary judgment. There are a number of cases cited there.

The Court: I don't seem to find any closing memorandum by the plaintiff.

Mr. DuBois: I will be able to give you the exact page.

The Clerk: On the summary judgment motion, your Honor.

The Court: Where does it appear in that memorandum?

Mr. DuBois: I will give you the page and line in just one moment, your Honor.

It is the opening memorandum, your Honor, and it is page 28. It is the one filed on or about February 15th. The last page of that opening memo-

randum, citing Moffat v. Smith and Fields v. Michael.

The Court: What is the theory of those cases? Tell me [36] about them.

Mr. DuBois: The theory is, for the first time we have case law that seems to say, and a lot of counsel have argued this back and forth, and I think the consensus is that the type of damage that we have here, where there is a wasting or diminution of the estate of the judgment creditor that is the result of certain negligence or certain tortious conduct on the part of the defendant, that instead of being considered, as counsel has designated, as special damage, so long as it impairs the estate it is considered property damage.

Counsel has relied on his citation of Cort v. Steene in his memorandum in support of the motion today, and I think counsel would probably concede, if he examines the record, that the Supreme Court of the State of California has granted a petition for hearing only within the last month.

The Court: What is the citation of that case?

Mr. DuBois: Cort v. Steene, your Honor, appears——

Mr. Callaway: Page 11 it appears.

Mr. Lopardo: 95 Advance Cal. App. 968.

Mr. DuBois: Page 11 of their memorandum, your Honor, the top line.

So that that entire opinion is set at large again by the granting of the hearing. We are back on the same proposition. Hunt v. Authier, Moffat v. Smith,

Fields v. Michael, still remain the law of the Supreme Court cases starting at [37] 28 Cal. 2d.

I think that would answer, probably, the proposition that the court has in mind as to what about the element of property damage. That is about the only answer that we have for it. The opinion of Cort v. Steene, on which they apparently rely, is not before us.

The Court: What is your view on the matter of a credit of the $3,500.00? Supposing, for instance, that plaintiff had recovered a judgment against Blodgett's for $31,000.00, and one against Richardson for $31,000.00, you couldn't have had two satisfactions.

Mr. DuBois: The policy provides, in substance, that defendant Royal will pay on behalf of its insured certain sums of money. There is the language of the policy that says the named insured is an assured. It says a permittee is an assured. I don't have any bay horse case that I can at the moment cite to the court as to what is the proposition as far as any controlling authority is concerned.

I think the language of the policy is clear that if there is a judgment against each of two, a named and an additional insured, the company's liability under the terms of its contract would be to pay the amount within the policy of that judgment.

The Court: As to each?

Mr. DuBois: The language of the policy, I think, says [38] it will pay on behalf of its assured. I will have to answer that yes. If they have two kinds of liability, as we contend they have here, they

have statutory liability under 402 of the Vehicle Code, and they have a common-law negligence liability, two different types, then I think the amount that is due under the policy would be that amount that is within the policy limits for each of the assureds, additional or named.

The Court: Regardless of how the insurance was split up, the fact remains that Blodgett's liability was that of owner, Richardson's was that of the driver, is that it?

Mr. DuBois: That is correct.

The Court: It may be that there is a different reason for there being insurance for Richardson. But actually it is a simple case of an owner and a driver.

Mr. DuBois: That is correct. If I can anticipate a court's question as to what is to be the treatment of this $3,500.00, I think the most direct answer would be the correspondence that is included in my affidavit in opposition, showing how the parties treated it.

The Court: Those letters between yourself and Mr. Callaway, were those letters put into evidence?

Mr. DuBois: No. But I have them here, your Honor.

The Court: At the motion for summary judgment?

Mr. DuBois: No, they were not. The issue wasn't raised until the reply memorandum of Royal came in, and then they say [39] there can't be but one judgment, "We have already paid you $3,500.00, so we don't owe you this much."

The Court: Is there any dispute, Mr. Callaway, that those two letters, as set forth in counsel's affidavit, rather, I think they are set forth—are they included in the affidavit?

Mr. DuBois: No; they are excerpted in the affidavit.

The Court: Your affidavit?

Mr. DuBois: Yes.

The Court: Is there any dispute that those letters were sent and received?

Mr. Callaway: No, your Honor.

The Court: Is there any objection to making them part of the record in this case?

Mr. Callaway: I think they already are.

The Court: How?

Mr. Callaway: By excerpts in the affidavit.

The Court: I am going to receive them in evidence by reference in connection with the hearing of this motion that has been made by the defendant.

Mr. Clerk, do you want to give them any kind of a number, or will that be sufficient?

The Clerk: I think they are part of the record as part of the affidavit.

Mr. DuBois: If your Honor wants the letters, I can file [40] them. I don't have them with me, but I can get them and turn them in to the court.

The Clerk: If you just order that the affidavit be deemed part of the record, and all of its contents, that would cover it.

Mr. DuBois: They are quoted directly at page 5 of my affidavit, bottom of page 4 and top of page 5 of my affidavit.

The Clerk: They are just quoted, your Honor; they are not exact copies of the letters.

Mr. DuBois: May I proceed, your Honor?

The Court: All right.

Mr. DuBois: If the question as to the intent of the parties is any test, we also have the same counsel approving the form of the judgment, the satisfaction of the judgment, which we set out in this affidavit of mine in support of the motion at page 4, that $3,500.00 paid by defendant Royal in that Superior Court case is to be paid to satisfy plaintiff's judgment against Blodgett's. And the words "said judgment" appear very distinctly both in the form I have quoted in the same affidavit on page 4, the exact language, that appears both on the form of the judgment and on the form of the satisfaction. There never has been any question until within the last short time, namely, counsel's memorandum in opposition to the motion for summary judgment, that that issue even existed. They are now contending for the first time that [41] $3,500.00 is referrable. We say if that be true there is a judgment for $31,000.00 against the additional insured, let that $3,500.00 come off of the top of the liability, the top of the judgment, and it does not apply—the first $3,500.00—toward calculating their liability under the contract. They have paid on account of the statutory liability of the owner.

The biggest point, I think, that plaintiff can make is that this Superior Court judgment, in the pleadings, and its legal effect, as I get the authorities, is that it is a final judgment valid on its face,

and it cannot be collaterally attacked. If attacked collaterally, it is only open to the judgment roll. The cases are many. I have annexed to my affidavit the photostatic copy of the original summons and return of service, which for this proposition would constitute the judgment roll. If a collateral attack is attempted, the only consideration that can be given in a collateral court on a collateral attack is the examination of the judgment roll. If the judgment is valid on its face, then those records, such as the exhibit that I have annexed to my affidavit, as I understand the cases—and the cases are many, and they are excerpted at length in the memorandum, too—those records are conclusively presumed to be correct and no extraneous evidence can be submitted in opposition to the effect of those court records. [42]

To try to answer, and I think we can successfully, some of the questions of the court. Counsel did not, while the proposed findings and conclusions were under submission, file any objections thereto under the rule. The court has said it has three questions, namely, service of process, which I think is answered by the citations that are contained in our proposition that there cannot be a collateral examination or a collateral attack in this court at this time; the question of definition of property damage under the terms of the policy, I think Cort v. Steene, has been answered. $3,500.00 credit on the account paid by defendant Royal for Blodgett's, I think has been answered. But the court had a few other questions in subsequent argument, which

suggests an interruption in my thinking for a moment.

The court has at several times asked in chambers, when counsel was present, and I think here, too, what did counsel contend is the conceding—the proposition under which the compulsory insurance aspect is conceded. I wanted to mention this one citation that I think answers that proposition, by way of momentary diversion, contained on page 20 of our reply memorandum, that under the treatment that this defendant insurer has given to our allegations, that this policy is compulsory and that that is foreclosed at this time. The case of Merchants Indemnity v. Peterson, Third Circuit, 113 Fed. 2d 4, I think that forever and all time will eliminate [43] that issue as to its compulsory aspects.

Now to get back to the questions of the court. One question that seemed to have the greatest significance to the court was, what could the insurer have done to avoid this condition that the insurer contends is iniquitous?

And if I might answer that question that the court put to counsel, I would suggest that the insurer interplead.

It will be recalled, if the court remembers our earlier authorities, that there were several cases that say that under this type of circumstances there are several things which an insurer can do. First, it can defend. In fact, it has the duty to defend. There is one whole paragraph on duty to defend under federal citations. It has the opportunity to defend. It has the opportunity to tender to the

insured the amount of its policy limits if the claim is for more than the amount of the policy, if plaintiff's claim is more than the amount of the policy. It can tender that amount to the insured and leave him at his own defense to defend. And I think that question could be answered in that fashion.

The Court: Do you mean to say that they can defend in the name of the insured without his consent?

Mr. DuBois: The citations are quite at length, your Honor, and if the court is interested I will point out——

The Court: Where do they appear?

Mr. DuBois: The page of the memorandum where that very [44] proposition is discussed, the bottom of page 21 of the plaintiff's closing memorandum of points and authorities.

The Court: On the motion for summary judgment?

Mr. DuBois: That is correct. Those are papers filed on the 15th of March. Page 21 and continuing under roman numeral VIII through the balance of page 22.

One other fact that seems significant, and that is that in the defendant's answer to plaintiff's interrogatories—these are the ones that were served on me on April 7, 1950, long before the case was actually decided—there is a statement on page 2, admission No. 10, line 23, that even at that date before the decision this defendant knew then and took the position that there had not been any

service of process on defendant Richardson in the Superior Court matter.

Examination of the filing date on that paper will show that at that date that was their position then.

The Court: Counsel, there is one other thing I would like to have you do for me. I am going to take these matters under submission and give them a little study. On defendant's motion for a new trial, to set aside the judgment, and brief in support thereof, filed May 5, 1950, beginning on page 2, line 7——

Mr. DuBois: Of their motion, your Honor?

The Court: Yes. Point 4, "It was error for the court to make the following findings of fact:" then defendant raises [45] questions as to certain findings by (a), (b), and on down through (1).

Mr. DuBois: On page 6?

The Court: (1) on page 6 is the last one of those findings that they object to.

Now, in passing on this motion for summary judgment I went through the pleadings to see whether or not there were issues of fact, and because of the admissions made, most of the issues, except legal issues, were fairly well disposed of, except in one or two instances I found further admissions in, I believe it was, the admissions of the defendant filed in this case to your request for admissions. I would like to have you go through, by memorandum, and cite me as to each one of those subdivisions (a) to (1), where an attack is made on the findings, as to where support is found

for those findings, either in the allegations of the complaint which are admitted, or in the admissions of the parties, or the answers to interrogatories, or whatever place support is found for them. It doesn't have to be lengthy. In fact, the briefer the better. Finding (a), and in two or three lines you could cite me where support is found for that.

Mr. DuBois: Very easily.

The Court: I want to test whether or not those findings are supported.

Mr. DuBois: May I say one thing in conclusion, your [46] Honor? If the court has any consideration for a vacating of the summary judgment for purposes of a new trial, there are authorities contained at page 13 of our memorandum——

The Court: On terms?

Mr. DuBois: On terms imposed by the court, yes, and I would like to have the court consider those terms. It is apparently a conditional vacating until a subsequent trial on the merits. There are certain impositions of the court properly placed against the moving party, and I would suggest to the court that, assuming now that defendant Royal had appeared for defendant Richardson in the Superior Court and made unnecessary this lengthy proceeding and the amount of work that has been done, then the plaintiff would request the court's taking evidence on value and nature of the claim for plaintiff's account, if that is one of the terms, and we would request that it would be. And if any vacating is done, it would seem to me that under any of the positions taken by defendant Royal that

it could be done, I am not certainly conceding that it should, but if it is done I think it could be taken just on the one issue of actual service of process. It is a simple, limited, special issue.

The Court: I am going to take your various motions under submission, including the motion to file an amendment.

I still think there are the three questions that I previously stated to be determined. I am inclined to feel that [47] the defendant is a little dilatory in raising this question of service. I still have the feeling that it almost looks like there was a good old sail in the wind that was held back until you found out which way the cat jumped, and then the card is brought out.

I say that for the reason that on March 15th you knew where Richardson was. The motion for summary judgment was set for hearing on April 3rd, and it wasn't decided until April 11th. Then findings were not entered up and the order of judgment not made until the latter part of April. Of course I know that counsel is busy. On the other hand, I don't know that it was necessary to send a lawyer to interview Richardson on factual matter. You had an investigator working on the job.

Anyhow, there are a number of questions that center around this allegation of lack of service.

One other suggestion, and that is we were discussing what might an insurance company have done had they found out that their insured—and I mean an insured in the status of Richardson, a man whom they had no contractual relations with

—had not actually been served and had not come to them and they couldn't find him. Let me back up, let's put it this way. Supposing that there was some question that arose as to whether or not Richardson had been served, and it became apparent to the insurance company that a default had [48] been taken against him, and possibly a default judgment, some question of fact as to whether or not he actually had been served with process within the six months period, so that the insurance company would still have had time to turn around and make its motions in the state court, would it not have been possible for the insurance carrier to have commenced a declaratory relief action with the plaintiff Olmstead in a court, for instance, the federal court, and allege that a dispute of fact existed as to whether or not Richardson had been served, that if Richardson had been served, the insurance company might be bound by what transpired, if he hadn't been served, the insurance company wanted a chance to set that default aside and set that judgment aside as a void judgment—why couldn't that matter have been litigated out at that time in '46 or early '47, instead of now on a motion after a judgment has been entered?

Mr. Callaway: Your Honor, the first time that I discovered or knew that there was a default and a judgment, if you want me to give you the exact date, was on the 17th of April, 1947. That was when I went into court to stipulate to judgment as against Blodgett's, at which time Mr. Olmstead's brother, who was an attorney, said to me, "Would

you waive any right of subrogation as against Richardson?" I said, "Of course I will. We can't find him." In other words, as you know, an owner has a right to recover over and against [49] the driver where they pay out any money. So the sole object of the letter which I wrote, a copy of which I still have, was to comply with that request. We thought it would be fruitless to go after Richardson. At that time we went up to court I discovered for the first time that a judgment had been entered against Mr. Richardson for some $31,000.00.

The Court: But you were then still within your year period if you claimed there had been no service.

Mr. Callaway: I didn't move for two reasons. As a matter of fact, I didn't at that time question service on him. I had no reason to. I had no knowledge of the fact. So there wasn't anything to make me suspicious about it at all. But what I did do is that I felt and relied upon the fact that he was required to comply with the terms of the policy in order to benefit from the insurance, by at least notifying us that he had been sued, and that if he didn't do that, then we didn't owe him a defense anyway. That comes up all the time. In other words, I take the position—I am not trying to reargue it—that since this happened beyond the boundaries of Pasadena, that compulsory feature was not involved.

The Court: That is a nice question of law.

Mr. Callaway: But that is the reason, if you want to know why we didn't even attempt to do anything. We felt, if a man didn't care any more

about his own affairs than to not [50] ask us to do that which we would readily have done, which he was entitled to under certain circumstances, we didn't owe him anything.

I think, if the Court please, you have asked counsel to do something for you that will be enlightening. There are other issues of fact there which the court has found on, and there is no basis for the court to so find——

The Court: In addition to those that you have listed (a) to (1)?

Mr. Callaway: Yes. Getting back to whether the $3,500.00 should be credited, and so forth, your Honor, that is just a plain construction of the very contract we are being sued on, and that particular type of contract is used by all the insurance companies, so if it is not right, that means, where two people are sued instead of one, that in every instance you double, you might say, the amount of insurance that people carry. The policy is in evidence. The amount of the coverage——

The Court: If it wasn't for your letters exchanged between you gentlemen, I don't think there would be much of a problem there.

Mr. Callaway: What does the letter say, your Honor? The letter says this—I have a copy of it right in front of me. My letter says, "Pursuant to your suggestion"—I didn't tell you one other thing. The draft that we got to pay this [51] $3,500.00, through force of habit, says "dismissal with prejudice." We knew the suit was in satisfaction of judgment, so I told Mr. Olmstead that that was

not the intent of it, and this is my letter: "Pursuant to your suggestion, this is to advise that although the draft of the Royal Indemnity Company payable to George N. Olmstead and Alford P. Olmstead, his guardian ad litem, and H. C. Velpman, stated on its face, 'Dismissal with prejudice Superior Court action 516890,' this was actually in satisfaction of judgment of the above-numbered case insofar as the defendant Roy Jordan, executor for the estate of Harry E. Blodgett, deceased, and as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, and not otherwise.

"I am authorized on behalf of my principal, the Royal Indemnity Company, to waive any right of subrogation against the co-defendant Sam G. Richardson."

The Court: Why did you think that Mr. Olmstead was interested in whether or not you waived your right of subrogation against Richardson?

Mr. Callaway: He asked me to.

The Court: He is not representing Richardson, why should he care whether you waived your right of subrogation against Richardson?

Mr. Callaway: Because if Richardson had any money—and they assumed that I assumed if he had any it was very little—they [52] didn't want us to go out and grab any. We said we won't pursue our claim for the $3,500.00.

The Court: That assumes, then, that you knew they were going to try to recover on the rest of that judgment.

Mr. Callaway: I knew they had a judgment on that date, I just got through telling you, on April 17, 1947, for the first time I knew that they had a judgment against Richardson for $31,000.00. I didn't think Royal was responsible for it. If they could collect it from Richardson, it was all right with me.

The Court: How much time do you want, Mr. DuBois, to send that memorandum in to support those findings?

Mr. DuBois: I heard your Honor say that you wanted to leave by the end of the month. I would like to have about ten days.

Mr. Callaway: Is there a stay of execution in this case?

Mr. DuBois: I haven't applied for a writ.

Mr. Callaway: I would like the court to make an order granting us a stay of execution for ten days after the court has ruled on this motion.

The Court: I don't see any reason why that shouldn't be done.

Mr. DuBois: I would be willing to stipulate to it.

The Court: That order will be made. How about a week? You ought to be able, as familiar as you are, you ought to be [53] able to dictate that memorandum that I have asked for in 20 minutes time. Mr. Callaway may want to answer.

Mr. DuBois: I will do it.

The Court: I am not going to give you even a week. If you want to submit a memorandum on that, I want it in here by Thursday, May 18th.

And, Mr. Callaway, if he wants to file any answer, may have one filed by Tuesday, May 23rd.

Counsel, I am not talking about any more law; I am just talking about these findings. "The finding that is attacked in that subdivision (a) finds support in paragraph VI of the complaint, which is admitted," and so forth, "in admission No. 3 to our request for admissions, in the answer of the defendant to interrogatory No. 7."

Mr. DuBois: I have given the court all the law I could find, anyway.

The Court: The matter will stand submitted.

(Whereupon, at 12:10 o'clock p.m., Monday, May 15, 1950, the matter was submitted.) [54]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 7th day of September, A.D. 1950.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed September 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 207, inclusive, contain the original Petition for Removal to Federal Court; Amended Complaint for Money Due on Contract; Answer to Amended Complaint; Plaintiff's Request for Admissions; Plaintiff's Motion to Strike Portions of Defendant's Answer to Amended Complaint and for Summary Judgment on the Pleadings; Plaintiff's Interrogatories; Answers to Plaintiff's Interrogatories; Answers to Plaintiff's Request for Admissions; Motion for Leave to File Amendment to Answer; Amendment to Answer; Order; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial and to Set Aside Judgment and Brief in Support Thereof; Statement of Reasons in Opposition to Motion; Memorandum—Findings of Fact Supported by; Memorandum Decision; Modified Finding of Fact and Conclusion of Law; Judgment; Supersedeas Bond; Notice of Appeal; Designation of Record on Appeal; Plaintiff's Designation of Record on Appeal and Application and Order for Extension of Time to File the Record and Docket Appeal and full, true and correct copies of minute orders entered May 22, 1950, and June 26, 1950, which, together with original reporter's transcript of proceedings on April 3, 1950, and May 15, 1950, transmitted herewith,

constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of September, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12691. United States Court of Appeals for the Ninth Circuit. Royal Indemnity Company, a Corporation, Appellant, vs. George N. Olmstead, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 21, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
Ninth District

No. 12691

ROYAL INDEMNITY COMPANY, a Corporation,
Appellant.

vs.

GEORGE N. OLMSTEAD,
Appellee.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant Royal Indemnity Company, a corporation, and states that the points which it intends to rely on for appeal are as follows:

1. It was error for the trial court to deny appellant's motion to amend answer;

2. It was error for the trial court to strike a portion of appellant's answer;

3. It was error for the trial court to grant a summary judgment in favor of appellee;

4. It was error for the court to grant a judgment based on an invalid judgment obtained in the State Court.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 30, 1950.

United States Court of Appeals
Ninth Circuit

No. 12691

ROYAL INDEMNITY COMPANY, a Corporation,
Apellant,

vs.

GEORGE N. OLMSTEAD,
Appellee.

STIPULATION

It is herein and hereby stipulated by and between Royal Indemnity Company, a corporation, Appellant, and George N. Olmstead, Appellee, by their respective attorneys of record as follows:

1. That to eliminate uncertainty in designating portions of the record to be printed as part of the record on appeal, this stipulation, to the extent that it can be used under Federal Civil Rules on Appeal, designate in the United States Court of Appeals certain portions of certain documents heretofore in the United States District Court designated as Plaintiff's and Appellee's Designation of Record on Appeal;

(a) That the excerpts of the Municipal Ordinance of the City of Pasadena as contained at page 17 lines 2-32, page 18 lines 1-32, page 19 lines 1-32, and page 20 line 1-24 of Plaintiff's Points and Authorities as annexed to Plaintiff's Motion to Strike Portions of Defendant's Answer to the Amended Complaint, for Summary Judgment on

the Pleadings, which documents are dated, served and filed February 15, 1950, and

(b) The Counter Affidavit of C. Paul DuBois dated May 10, 1950; the Affidavit of Deputy Sheriff R. W. Carter dated May 9, 1950; the certified copy of the California Department of Motor Vehicles' Order of Suspension dated February 7, 1947, which said certified copy of Order was the substituted exhibit filed about May 17, 1950, by order of Court in place and in lieu of a copy of the Order of Suspension as originally filed, and certified copy of the recorded Abstract of Judgment dated September 18, 1946, in the Superior Court of the State of California in and for the County of Los Angeles, and recorded September 18, 1946, in the office of the Recorder of Los Angeles County, which said documents are exhibits as annexed to Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for New Trial and to Set Aside Judgment and Order to File Amendment to Answer, which said memorandum is dated May 10, 1950, and was served and filed on said date;

2. That the remainder, save and excepting those documents hereinabove described, of plaintiff's memoranda of points and authorities dated Feb. 15, 1950, and May 10, 1950, and served and filed on said dates may be disregarded in the printing of the record on appeal.

Dated this 29th day of September, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellant.

/s/ C. PAUL DuBOIS,
Attorney for Appellee.

[Endorsed]: Filed October 4, 1950.